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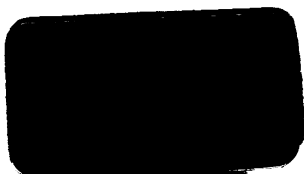
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The Lackawanna Jurist

Containing Decisions of the Supreme
and Superior Courts of Pennsylvania,
and the Various Courts of Lacka-
wanna County, Together with a
Number of Cases Decided in Other
Courts between January, 1906, and
January 1907.

VOLUME VII.

Edited by FRANK J. FITZSIMMONS,
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SCRANTON, PA.
1907.

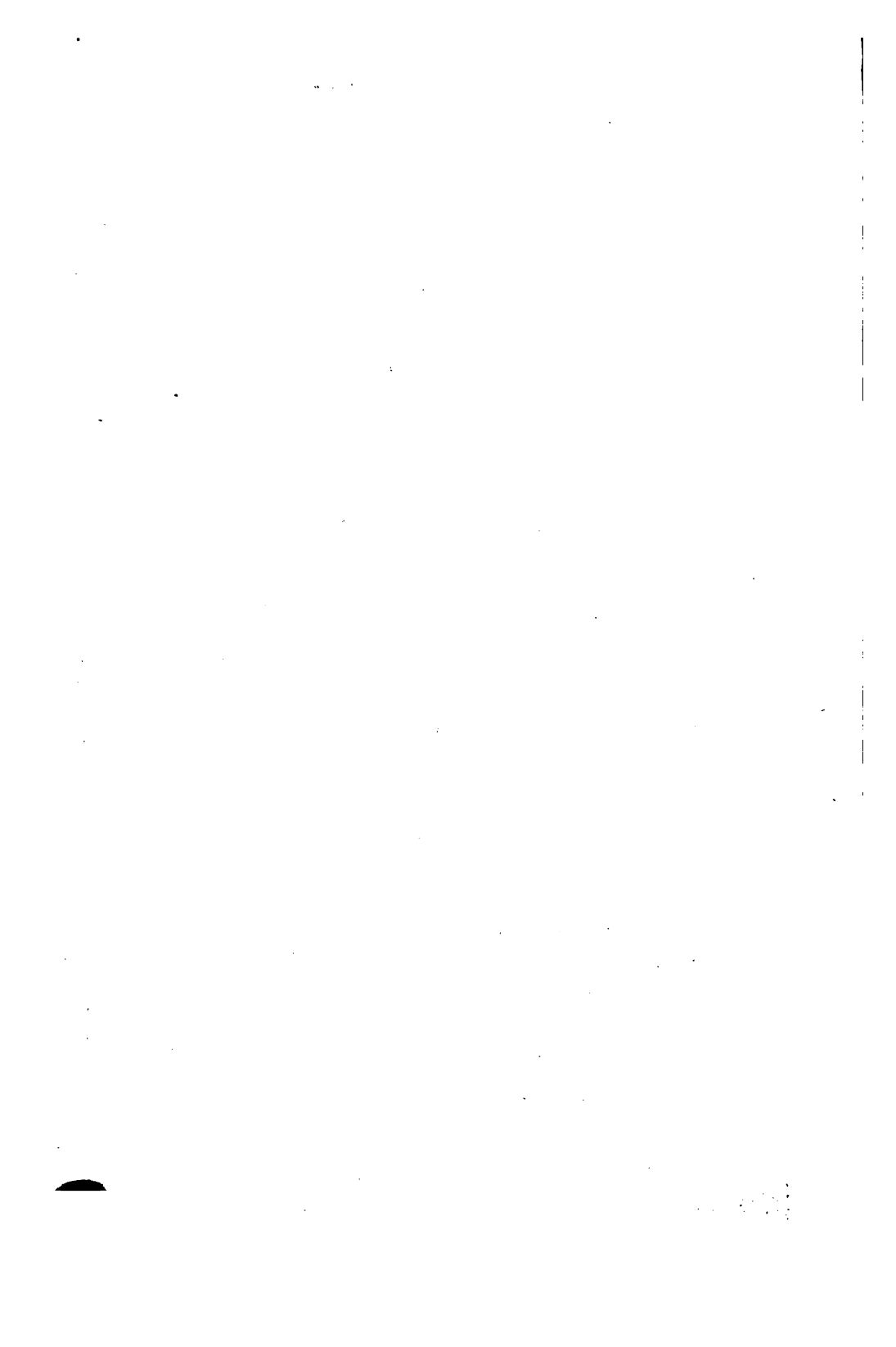


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ABATEMENT.

Rule to Strike Off Plea.

A plea in abatement, being a dilatory plea, should be interposed at the first opportunity. While such plea should be entered within four days after appeal is filed yet under proper circumstances the court may, in its discretion, allow it to be entered at a later time.—*Peter Antonio vs. Rocky Glen Water Co., et al.*, 153.

ADJUDICATION.

The fact that no valuable consideration passed and that the assignment was from a father to a son, raises no presumption against its fairness and honesty, and does not place the burden on the assignee to affirmatively show its fairness, and that it was a voluntary act without undue influence.

Every fiduciary relation implies a condition of superiority held by one person over the other.

Where a person obtains an assignment from a person physically infirm and mentally weak, and the assignee is a person who stands in a close and confidential relation to the assignor, the assignee is bound to show that the assignment as a gift was righteous and conscientious, and also that the assignor acted intelligently, deliberately and freely, with full information of the amount of his property, the effect upon the estate, the nature of the assignment, and that no advantage was taken of the confidential relation.

Relation of father and son, the benefit passing from father to son does not shift the burden to the son to prove the fairness and honesty of the transaction.

Where plaintiff fails to establish the material allegations of his bill by two witnesses, or one witness and such corroborating circumstances as would amount to another, defendant's motion for a decree of dismissal at close of plaintiff's case should have been allowed.

A plea in abatement is a dilatory plea and must be interposed before an issue is joined on the merits; and pleading in bar is a waiver of the right to plead in abatement.

A son claiming against his father's estate is incompetent to testify to an agreement between him and his father relating to the fund in controversy.

The exception is: Unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.—*John Vaughan, Admr. vs. Daniel W. Vaughan, et al.*, 231.

AFFIDAVIT OF DEFENCE.

An affidavit of defence was found to be objectionable because of vagueness and uncertainty and as failing to show that any damage had accrued to defendant prior to the commencement of the suit. A supplemental affidavit was filed and in it set-off was taken as the defence.

Held: When defence is taken on the ground of set-off the defendant, in a sense, assumes the affirmative of the issue. It was only fair to the plaintiff that the affidavit of defence in such cases should be tested by the same rules that would apply to his declaration if he were suing for the damages in question and the sufficiency of the declaration were challenged by demurrer.—*Yellow Cliff Land Improvement Co. vs. Peck Lumber Manufacturing Co.*, 347.

AMENDMENT.**Rule to Amend Record.**

A summons issued against two persons as alleged partners. It was served on one only. Neither appeared. Judgment was entered against both. Held, void as to the defendant not served, and therefore it could not be sustained as to the defendant served.—*Botdorf vs. Shaffer & Bro.*, 273.

APPEAL.**Rule to Strike off.**

Wetzel & Hamilton vs. Alleman, 57.

Rule to Show Cause.

Luckey's Appeal, 61.

Where a defendant fails to take an appeal until more than twenty days after judgment is rendered against him, unless he shows he was misled to his prejudice by something said or done either by the justice or the adverse party, and said appeal is entered nunc pro tunc, the Court, on a rule to strike off the same, will make the rule absolute.—*George Grassa, et. al., vs. George W. Welland*, 72.

Rule to Strike Off.

The act or declaration relied upon to justify the Court in allowing an appeal taken, after the twenty days had expired, must be unequivocal in character and well calculated to mislead a person in the exercise of ordinary discrimination.—*Scranton Private Hospital vs. John J. Barrett, et al.*, 177.

From Summary Conviction.

A father who sends his children to a Polish school, where the only subjects taught in English are reading and arithmetic, all instruction on other subjects being in Polish, is guilty of a violation of the Act of July 11, 1901. *P. L.* 658.

To meet the requirements of the act, the child must be sent to a school in which orthography, reading, writing, English grammar, geography and arithmetic are taught in English.—*Commonwealth vs. Snyder*, 263.

Rule to Strike Off.

Frederick vs. Leshner, 301.

ATTACHMENT.

Rule on Plaintiff to Show Cause.

Black vs. Brown, 95.

Rule to Dissolve.

An attempt to defraud within the meaning of the Fraudulent Debtors' Act of March 17, 1869, P. L. 8, as amended by the Act of May 24, 1887, P. L. 197, cannot be inferred from an intent to prefer a creditor.

The Act of March 28, 1905, P. L. 62; relative to the sale in bulk of the whole or a large part of a stock of merchandise and fixtures, or merchandise, or fixtures, not in the ordinary course of business, does not enlarge the operation of the fraudulent debtors' attachment, which has to do only with actual fraud.—Stowers Pork Packing and Provision Co. vs. Shoener, 152.

Rule to Quash.

Lopez vs. Donohue, 163.

Upon the dissolution of an attachment under the Act of March 17, 1869, P. L. 9, and its supplements, the sheriff is bound to restore the goods to the owner unless prevented by the intervention of some cause over which he could have no control.

An action of trespass was brought against the sheriff and an attaching creditor. There was a verdict against the defendants jointly, showing that the attaching creditor was found to have participated in the acts of the sheriff.

The grounds of defence was the alleged fraudulent character of the sale under which the plaintiff claimed title from the defendant in the attachment.

In the judgment of the court the attaching creditor failed to impeach that transaction.

Held: That the measure of damages was the value of the goods of which the evidence showed the plaintiff to be deprived.—W. B. Rogers vs. C. H. Schadt and Adolph Marcus, 356.

CAPIAS.

Rule to Show Cause.

A resident of Deposit, New York, in returning from court held in another part of the State of New York, where he was a party and witness, passed through Pennsylvania, and was there served on the train with a capias. Rule to set aside capias, discharged.—Cronk vs. Wheaton, 285.

CASE STATED.

The fees of a deputy constable for serving a subpoena are the same as those of the sheriff for like service under the Act of July 11, 1901, P. L. 663.—Newton vs. Luzerne County, 30.

A person who simply goes about and takes orders for goods as the agent of a non-resident business house, and afterwards delivers them to the several purchasers and collects from them the prices at which they were sold does not violate an ordinance which provides that every person who enters in a transient business for the sale of any merchandise "from cars, platforms or transient warehouses, shall and must take out a license for the same from the city treasurer of said city."—*Commonwealth vs. George I. Griswold*, 135.

It is a well known principle of construction that the language of a deed in case of doubt will be construed most strongly against the grantor.

It is a familiar rule that a deed or grant must be construed most strongly against the grantor. This applies with especial force to a reservation or restriction whereby there is a withholding of something from the grant.—*W. W. Watt, et. al. vs. The Finn Coal Co.*, 138.

County auditors are entitled to legal advice in the performance of their official duties, and the attorney employed by them may recover from the county a reasonable compensation for his services.—*Niles & Neff vs. York County*, 287.

Walker vs. McKean County, 308.

Jane B. Frink, to the use of vs. the Aetna Life Insurance Co., 337.

CERTIORARI.

It is the better practice when proceeding to recover a penalty for the violation of the act of 1855, P. L. 53, prohibiting the sale of liquors on Sunday, to submit to the magistrate a sworn information or complaint before he issues the summons, although a praecipe might possibly answer the same purpose.

If the place where the law has been violated is in any poor district then the suit should be in part to the use of the overseers of the poor of the township or whatever the district might be called.—*W. L. Riley vs. J. R. Compton*, 145.

The fact that a party sued in trover before a justice of the peace, where assumpsit was the proper form of action, is no ground for reversal on certiorari, if the justice had jurisdiction of the subject matter of the litigation.—*Mericle vs. Van De Boe*, 271.

The record of a justice of the peace or alderman must set forth sufficient facts to show clearly that the action is trespass *vi et armis* and not trespass on the case. Since the Act of 1887, consolidating actions of trespass and case, the word "trespass," standing alone on the justice's docket or transcript, is not in itself sufficient to show that the cause of action was within his jurisdiction. The record must also show the time and place of the commission of

the trespass complained of, and sufficiently describe the property injured and the nature of the injury to protect the defendant from another suit for the same cause of action.—*Wilson vs. Trout*, 274.

COMMONWEALTH.

Rule to Quash Proceedings.

Commonwealth vs. Tuchman, 32.

Rule to Show Cause.

Commonwealth vs. Gabriel, 45.

Motion to Vacate Order for Support

Commonwealth vs. Neese, 79.

Rule to Quash Indictment.

The Act of April 23, 1903, P. L. 268, relating to the use of automobiles on the public highways is unconstitutional because its title is misleading.

Nothing is said in the body of the act about licensing any one other than the owner. The penalty prescribed is incurred through the owner's failure to procure the license. But so far as the title says anything on the subject it indicates a purpose to put the duty of getting a license only on the person of the operator and to attach the penalty to his default in that regard. There is a substantial variance between the title and the body of the act in that respect, and it brings Sec. 6 within the prohibition of Sec. 3, Art. III, of the constitution, which requires that the subject matter of a statute shall be clearly expressed in its title.—*Commonwealth vs. Alfred Harvey*, 121.

Commonwealth ex. rel. Jennie Jenkins vs. Anthony Seeger, et al., 143.

Commonwealth ex. rel. W. R. Lewis, District Attorney vs. John F. Jones, et al., 256.

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DEMURRER.

To Plaintiff's Statement.

An ordinance in accordance with the Act of Assembly approved June 28, 1895, P. L. 408, is not in violation of Article IX, Section 7, of the constitution prohibiting municipal appropriations for "any corporation, institution or individual."

Nor is such an ordinance in violation of Section 18, Article III, of the constitution, which prohibits, except for pensions and gratuities for military services, all appropriations for charitable, educational and benevolent purposes to any person, community, denominational or sectarian institution, corporation or association.

The fund raised by virtue of such an ordinance is not a pension or gratuity bestowed as a mere charity or benevolence, but rather something for important municipal services of which the public has the benefit.—Firemen's

Relief Association vs. City of Scranton, 33.

Bertles vs. The Laurel Run Turnpike Co., 74.

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To Bill in Equity.

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EJECTMENT.

The service of the writ in an action of ejectment upon the defendant and a plea of the general issue raised the presumption of ouster by the defendant of his co-tenants and his adverse possession of the premises.

An abstract legal proposition the possession of one tenant in common is ordinarily the possession of all. The inference is that he holds for all tenants in common until a hostile intention appears, and this must be disclosed by unequivocal acts fitted to appraise the co-tenant or co-tenants as to the existence of an adverse possession.

A writ in ejectment issued upon the day of the approval of the Act of May 8, 1901, P. L. 142 Defendant pleaded not guilty and went to trial upon the issue as thus framed.

Held: That having gone to trial upon the issue as framed, the defendant should not be heard to raise the question that the case was not at issue because the issue was not framed in accordance with the Act of May 8, 1901, P. L. 142.

An act of assembly becomes operative only from the time of its approval, or when it has otherwise become a law, according to the weight of the authorities. The most reasonable rule, and one which is the least liable to work injustice, is that in the absence of evidence an act done on the same day as the law is passed will not be presumed to have been done previous in point of time to the passage of the act.—Jessie Hoysradt, et. al vs. Isaac B. Felts, 5.

EQUITY.

The power vested in courts of equity to make orders for the discovery of facts material to a just determination of the issues, arising in said courts, should not be exercised for the convenience of a plaintiff in the preparation of his case—Miles, et. tl. vs. The New York, Susquehanna & Western Coal Co., et. al., 13.

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Demurrer to Bill.

Shepard vs. Davidow, 93.

INDEX

As a general legal proposition the president of a corporation, who purchases the property of the corporation at a public sale, holds it as a trustee for its stockholders.

If the president of the corporation has any knowledge of facts that would give the property of the corporation a possible prospective value beyond its apparent value, he is bound to communicate such knowledge to his fellow stockholders in case he procures a sale of the property to himself.

If, with such knowledge uncommunicated to his fellow stockholders he becomes a purchaser of the corporate property at a sale, whether public or private, he holds the same as a trustee for his fellow stockholders, and if he thereafter sells the property at a profit, he is bound to account to them for such profit.

A director or officer of a corporation has the right to become a creditor of the corporation if the necessities of the case require it. He may advance money to meet the needs of the corporation, and if he does so, he has the same rights as other creditors. He has the right to secure a judgment for the amount of his indebtedness, and to take the corporate property in execution for the payment of such judgment, and if it becomes necessary, in order to protect his judgment, for him to bid upon the property and to become the owner of it, he has the right to do so.

While it is true that generally speaking a director of a corporation cannot acquire the property of the company either at private or public sale to the prejudice of a stockholder, yet there are exceptions to this general rule. He may loan money to the company and take security for it, and he may enforce such security in the same manner as any other creditor if he acts in entire good faith.—John B. , et. al. vs. E. L. Fuller, 97.

Motion to Continue.

Where the whole structure is substantially carried forward it is not a bay window nor can it be made into one merely by inserting or opening windows in its walls.

A bay window is distinctively and essentially a window projected outwards beyond the front line or place of a building, on a square, polygonal or circular plan, the effect of which is to form a bay or recess in the room from which it projects or opens. If it is supported or carried on corbels or brackets, it is called an oriel; if circular in plan, it is a bow window; if it is straight sided and rests upon the ground it is a bay window proper; and if it extends up over more than one story. it is called a double or triple bay according to the number of stories to which it reaches.—Charles E. Chittenden, et. al. vs. Joseph Redington, 131.

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HABEAS CORPUS.

Where at a habeas corpus proceeding the adopting parent relinquishes all claim to a child, there is nothing left the court but to restore the custody of the child to the mother.—Commonwealth, ex. rel., Jennie Jenkins vs. Anthony Seeger, Hattie Seger and Jane A. Decker, 143.

INDICTMENT.

Rule to Quash.

Commonwealth vs. Alfred Harvey, 121.

An instrument void on its face because meaningless, indefinite, or lacking a payee is not a subject of forgery.—Commonwealth vs. T. Mitchell, 129.

Motion to Quash.

An indictment under the Act of March 31, 1860, Sec. 111, P. L. 382, for obtaining property under false pretenses, must distinctly charge that the property in question was obtained by the false pretenses set out in the indictment; nothing must be left to inference.—Commonwealth vs. Shoemaker, 299.

INJUNCTION.

Motion to Dissolve.

The owner of buildings on the opposite sides of a fourteen-feet wide public alley will not be enjoined, at the instance of an adjoining property owner, from erecting between his building a bridge six feet wide and twelve feet high more than fourteen feet above the surface of the alley, in the absence of proof that the bridge would interfere with travel on the alley or cause any injury to the plaintiff.

A private citizen cannot enjoin an interference with the public highways unless he shows that his legal rights have been invaded, causing some special damage to himself of a serious nature.—McMullen vs. Williamson, 208.

IN RE:

Stokes' Estate.

Under the Act of June 4, 1879, P. L. 88, a bequest by a testatrix of "all the rest, residue and remainder of my estate of every nature and kind, real,

personal and mixed," is a valid execution of a general testamentary power of appointment.—*Stokes' Estate*, 29.

Painter's Estate, 47.

Estate of Mary Ann Cawley, Deceased.

Testamentary capacity for the valid execution of a will is the knowing and comprehending the transaction; or in the popular phrase, that the decedent should, at the time of executing the will, know and understand what she is about.

The question being the condition of the decedent's mind on the day the will was written, under all the authorities, the evidence of its condition at a time near the date would be evidence as to its condition at that time.

Proof of testamentary capacity should be made by "evidence of the most unexceptional kind and character bearing on every act of disposition, and confined to the time of execution."

The age of attesting witness is only to be considered with reference to

The age of the attesting witness is only to be considered with reference to the requisite degree of intelligence necessary to competence in the witness. As regards children, no arbitrary and conclusive standard of years can be established, as the degree of understanding, which is the test of competency, is not developed at the same age.

The testimony of the subscribing witnesses to a will is, of course, entitled to great respect. In the absence of countervailing proof, it is decisive, but the court should not hinge the cause upon the testimony of subscribing witnesses, if there are other material facts and circumstances, and opinions of other witnesses in evidence, bearing upon the question of the defendant's capacity.

Evidence in this case held to be sufficient to sustain the appeal.—*In Re Estate of Mary Ann Cawley, Deceased*, 49.

Luckey's appeal, 61.

Estate of Leopold Galboesoh, Deceased.

An administratrix, as to expenses of administration, should await the final settlement of her administration account, when, if a deficiency of personal assets appears, a sale may be authorized to pay the balance due the accountant.

The Act of June 8, 1893, P. L. 392, only has reference to debts of a decedent existing at the time of his death, and does not apply to debts and expenses necessarily incurred after his death, in his burial and settling his estate. Such claims are not debts of the decedent within the meaning of the act, although payable out of his estate.

Where an administratrix has paid from her funds a debt of the decedent she may obtain an order of sale to repay to her the said debt.

That the original creditor had been paid by the administratrix does not deprive the latter of her right to call for re-payment; such payment entitles her to subrogation.

Mere inadequacy of price is not sufficient ground for setting aside an Orphans' Court sale.

Where sufficient cause does not appear an order confirming a sale will not be vacated.—In Re. Estate of Leopold Galboesch, Deceased, 65.

Petition and Answer.

Elton's Estate, 82.

Schaeffer's Nomination, 91.

Sweeney's Estate, 94.

Estate of Mary Ford, Deceased,

When a sale is sought, for the payment of debts, the court should be satisfied that not only that the personal estate is insufficient for the payment of debts, but that the claims alleged to exist against the estate are bona fide debts, due and unpaid.

It is sufficient if the claimant establishes a prima facie claim.

Under the Act of June 11, 1891, P. L. 287, providing that a party otherwise incompetent may testify as to relevant matter occurring in the lifetime of deceased, if another and competent witness has testified that said relevant matter occurred in his presence and in that of the surviving party the testimony of such competent witness must be adverse to the surviving party.

On account of the identity of interest of husband and wife, when one of them is incompetent to testify as witness, the other also is incompetent. Sec. 5, Clause (e), Act of May 23, 1887, P. L. 158.—Estate of Mary Ford, deceased, 117.

Exception to Report of Viewers.

Application of John A. Dieter for appointment of viewers, 140.

Exceptions to Readjudication.

Singer's Estate, 159.

Abbott's Estate, 162.

Assessments of Benefits and Damages.

An exception to an assessment as being too high is not well taken. The remedy is by appeal.

An ordinance must be sustained that contains the essentials of a complete ordinance for the purpose for which it was enacted.

The duties of viewers appointed under the remedial act of May 16, 1901, P. L. 71, and the act of May 16, 1891, P. L. 75, are clearly stated in the case of Omega Street, 152 Pa., 129.—In Re. Assessment of Benefits and Damages, 12th Sewer District of Scranton, Pa., 170.

Petition for Account.

Jones' Estate, 174.

Rickert vs. Philadelphia & R. R. Co., 178.

Exceptions to Adjudications.

Thompson's Estate, 180.

Petition and Answer.

Robinson's Estate, 182.

Lieberman's Sons' License, 183.

Gibbins' Estate, 186.

Norris' Estate, 189.

Bowen's Estate, 195.

Petition for Partition.

Spielman's Estate, 198

May's Estate, 201.

Pare's Estate, 203.

Where a will has been duly probated, and letters granted, the only mode in which they can be revoked by the Orphans' Court is on appeal from the register.—In Re: The Estate of William Cornell, Deceased, 211.

Rule to Show Cause.

Gerber's Estate, 306.

tion for a Decree for the Specific Performance of a Contract.

Petition of Patrick W. Feley, deceased, 318.

Removal of R. F. Walker, Justice of the Peace, 325.

Redivision of the Wards of Winton Borough, 328.

Exceptions to Report of Viewers.

Paving and Grading Capouse avenue, in the City of Scranton, 360.

The Estate of Billington Ruckle. 365.

JUDGMENT.**Rule for, Now Obstante Veredicto.**

An action of trespass was brought against the defendant, an insurance agent, to recover damages on the theory that he agreed, as agent for the Lodge, to extend the insurance, then in force, at its expiration; that he had neglected to do so and that as a result of such negligence, through a fire, the Lodge lost the amount of the insurance.

It was shown that the defendant received the premium and that he agreed to give the Lodge an extension of insurance when the policy, then in force would expire. The jury found for the plaintiff.

Held: That the evidence will support the finding of the jury that the defendant was the agent of the Lodge in the matter of getting an extension of the insurance. He was not acting in his capacity as an agent for any insurance company when he agreed to extend the insurance, and even if he only represented one insurance company it could not have been held liable to the plaintiff. He did not agree to insure the Lodge; he could not do so; and it could only be fairly inferred that he would procure insurance in an insurance company for them. Under such circumstances he became the agent of the Lodge.—Sheridan Lodge, Knights of Pythias, No. 210, of Peckville, in Lackawanna County vs. Samuel W. Arnold, 1.

Rule to Open.

Applications to open judgments by default, and let the defendants in defence, are appeals to the equitable power of the court, and should be made with reasonable promptness.

A defendant having knowledge of a judgment against him, for eleven years, is in no position to invoke the aid of a court of equity for relief against the collection of such judgment.

Unless a defendant can give a satisfactory excuse for an unusual delay, he is chargeable with laches.—F. J. Johnson vs. Arthur Frothingham, 11.

Rule For.

A contract "guaranteeing" payment of a debt "when due" is a contract of suretyship.

Unless restrained by the bankruptcy court, the creditors of one against whom a petition in bankruptcy has been filed are not debarred by the mere fact of its filing from instituting their actions in the state courts against him and prosecuting them to judgment.—Reading Trust Co., vs. Boyer, 21.

Highland Brewing Company vs. Becker. 41.

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Tryon vs. Sapovits, 44.

Rule to Open.

Edwards vs. Welsh Baptist Church, 53.

Rule For.

While book entries can be given using terms commonly known in the trade; yet the character of the business must be stated somewhere so as to make the statement intelligible, precise and concise.—Tobyhanna Creek Ice Co. vs. Bert Kime, 147.

Rule to Open.

City Savings Fund and Trust Co. vs. Lintner. 155.

Rule to Show Cause.

Fliegenbaum, et. at. vs. O'Mara, 200.

Motion For.

Stephenson vs. Dodson. 277.

Rule to Show Cause.

Keilholz vs. Keilholz, 298.

JUDGMENT.

Rule for Non Obstante Veredicto.

City of Scranton vs. M. A. Ansley, et. al., 329.

LIEN.

Rule to Strike Off.

City of Scranton vs. M. C. Ansley, et. al., 329.

The Act of June 4, 1901, P. L. 364, does not require a bill of particulars and a mere general description of the kind of work is sufficient. The authority to amend at any time is conferred by Sec. 35 of the Act.—City of Carbondale vs. Patrick Campbell, 339.

MANDAMUS.

The county commissioners alone, with the approval of the judges, as provided in the Act of April 19, 1895, P. L. 38, have a right to make modifications in a contract for the erection of a county court house. They cannot delegate any authority in reference thereto to the county controller, and he has none

by common law, or under the Act of June 27, 1895, Sec. 10, P. L. 403. Hence, where the contract provided that alterations might be ordered by the architect, "in writing, with the counter signatures of the county commissioners and the controller," held, that the controller had no power to countersign the order.—County Commissioners vs. County Controller, 26.

Bertles vs. The Laurel Run Turnpike Co., 74.

Petition for.

Lamberton vs. City of Franklin, 290.

Rule to Show Cause.

Yaggi vs. Gahan, 294.

Sur Petition for.

Com. ex. rel., etc., vs. Robert W. Allen, Register of Wills, 340.

Com. ex. rel., Joseph P. Jennings vs. Michael J. Garvey, 374.

NON-SUIT.

Rule to Take Off.

The plaintiff entered into a contract, in writing, with the defendant to furnish the latter with two show cases and "set them up at defendant's store." The parts of the cases were received and placed by direction of defendant in a room of his store where unopened packages were kept, awaiting the coming of plaintiff's representative who was to set them up. The same night the store, including the parts, was destroyed by fire.

Plaintiff brought suit on the entire contract for the agreed price of the cases.

Held: That "setting up" was a material part of the plaintiff's contract and it could only recover upon proof that the contract had been performed in that respect, unless performance had been waived or prevented by the unauthorized act of the defendant.—Diamond Glass Co. vs. John H. Ladwig, 25.

A non-suit is properly directed when the proximate cause of an injury was due to a casualty which the defendant was not reasonably bound to foresee.—Eagle Hose Company vs. Priceburg Electric Light Co., 128.

Plaintiff, who was going to his employer's works, attempted to cross a private track by passing between two cars standing thereon, although he could have reached his destination by a more circuitous route. The cars extended through the open doors of the building, where the force was applied which moved them and caused the injury. He admitted that he did not look to see whether the cars were about to be moved before crossing, but said

that had he looked, he could have seen nothing. His statement to this effect was a conclusion or inference rather than a fact, as appeared from the width and height of the doors, their proximity to one another and the size of the car standing therein, together with the fact that there was opportunity to see from within outward. Held, that he had been guilty of contributory negligence and could not recover for injuries sustained by being caught between the cars, which were suddenly moved, in his attempt to pass between them.—*Damikus vs. The Standard Steel Car Company*, 282.

Motion to Take Off

Chase vs. Chase, 314.

PETITION.

A change of location of a route by a proposed railroad cannot be permitted after a jury appointed to assess the damage have filed their report, nor where it appears that the change is made for the purpose of bargaining with land owners for the cheapest route; but where an unforeseen and unavoidable condition, so far as the railroad is concerned, arises, the court will not only recognize the right to relocate, but will approve bonds for the new location. Hence where, after the location of its route, by a proposed railroad, another railroad has exercised its option and located its right of way in part on such location, the court will approve bonds for a relocated route.

The fact that security is not given to a grantee of respondents, whose rights and property will be affected by the location on the proposed route, does not affect the right of the railroad to file bonds as to respondents.—*In Re. The Philadelphia & Western Railroad Co.*, 15.

Petition and Answer.

Elton's Estate, 82.

For Citation.

United Telephone & Telegraph Company's petition, 85.

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In Re: Removal of R. F. Walker, Justice of the Peace, 325.

For Review.

Redivision of the Wards of Winton Borough, 323.

Com. ex. rel., etc., vs. Robert W. Allen, Register of Wills, 340.

QUO WARRANTO.

Quo warranto will lie where a person is still exercising and claiming the right to exercise, at least in part, the duties of a public office.—Commonwealth of Pennsylvania ex. rel., P. D. Manley vs. August Wahlers, 47.

Section 4 of the Act of June 1, 1883, P. L. 54, provides: "That the members of town councils shall have power to fill in any vacancy which may occur therein by death, resignation, removal from the borough, or otherwise."

Held: That notwithstanding the comprehensive term "otherwise" it cannot be said that absence from one or more meetings of a council caused by sickness, accident, temporary absence from home, or other similar causes would justify a council in declaring a vacancy.

It is a well known rule of construction that in a statute a general word following particular and specific words of the same nature as itself often takes its meaning from them, and it is often presumed to comprehend only things of the same kind as those designated by them, unless there is something to show that a wider sense was intended.—Commonwealth ex. rel., W. R. Lewis, District Attorney, vs. John F. Jones, et. al., 256.

Com. ex. rel., etc., vs. William Saunders, 353.

Com. ex. rel., etc., vs. John Carden, et. al., 371.

REFEREE.

Exceptions to Report Of.

Plaintiff's property was injured by repeated overflow of a public sewer. The overflow was due to an obstruction negligently suffered to remain by defendant. The latter had actual and constructive knowledge of the obstruction prior to any injury occurring. Defendant maintained that the inundation had occurred more than once prior to the period of six years next before suit brought, and, in consequence plaintiff was chargeable with knowledge that it

would recur with any similar storm and was, therefore, guilty of contributory negligence.

Held: That the plaintiff had no reason to expect that the sewer would not be put in proper repair. It was a case where the city was in duty bound to make necessary repairs to one of its public improvements. The plaintiff was entitled to rely upon the performance of that duty.—*Mary C. Ansley et al. vs. The City of Scranton*, 222.

TRESPASS.

"Margin of the lake" is a term of unequivocal import, meaning the line where the earth and water meet around the lake. By the use of these words riparian owners declare their intention to make, not the middle, but another part of the lake—the edge of the water—the boundary line.—*Helen M. Fuller vs. Uriah Cole*, 250.

TRIAL.

Motion and Reasons for a New.

Turnpike Company vs. Montgomery County, 52

Motion for Arrest of Judgment.

Shardin vs. Rhoades, 77.

Rule for.

It is generally agreed that a traveler's previous knowledge of a defect in the highway whereby he is injured is not in itself sufficient, as a matter of law, to prevent his recovery on the ground of contributory negligence.

It is not contributory negligence for one to pass over a dangerous bridge with knowledge of its unsafe condition, in the absence of distinct notice to him or to the public not to use it.—*William Qualey vs. The City of Scranton*, 122.

Nissley et. al. vs. Hoffman Bros., 149.

Szymter vs. Scranton Railway Co., 165.

Rule for a New.

A contract in suit was under seal and contained a provision that "no verbal agreement will be recognized whatever." The defence was the denial of any contract. Defendant admitted the genuineness of his signature but asserted that it was obtained by a trick of the plaintiff's agent.

There was no question of varying or reforming the writing signed by the parties, or restraining its enforcement, but rather whether there was any contract between them. It was a defence seeking the cancellation not of a contract but of a pretended contract. The case was purely a question of credi-

bility and weight of the evidence with the burden on the defendant.—J. W. Guernsey vs. F. C. Pilger, 345.

Helen M. Fuller vs. Uriah Cole, 350.

Rogers vs. Schadt et. al., 356.

VIEWERS.

Exceptions to Report of.

In Re: Application of John A. Dieter for Appointment of Viewers, 140.

The Act of 1889 which gives abutting property owners sixty days after the passage of the ordinance authorizing the laying of the payment in which to make a choice of the kind of payment to be laid is supplied by the provisions of the Act of 22d May, 1895, P. L. 105, as amended by the Act of 25th of April, 1903, P. L. 301, which applies to all cities and so of course to cities of the second class.

The provisions of the Act of 1895, as amended by the Act of 1903, require the advertisement of an ordinance. The omission of such advertisement is fatal to the validity of the ordinance.—In Re: Paving and Grading Capouse Avenue in the City of Scranton, 360.

*In the Court of Common Pleas of Lackawanna County, No. 384,
September Term, 1903.*

RULE FOR JUDGMENT NON OBSTANTE VEREDICTO.

Sheridan Lodge, Knights of Pythias, No. 210, of Peckville, in Lackawanna County vs. Samuel W. Arnold.

An action of trespass was brought against the defendant, an insurance agent, to recover damages on the theory that he agreed, as agent for the Lodge, to extend the insurance, then in force, at its expiration; that he had neglected to do so and that as a result of such negligence, through a fire, the Lodge lost the amount of the insurance.

It was shown that the defendant received the premium and that he agreed to give the Lodge an extension of insurance when the policy, then in force, would expire. The jury found for the plaintiff.

Held: That the evidence will support the finding of the jury that the defendant was the agent of the Lodge in the matter of getting an extension of the insurance. He was not acting in his capacity as an agent for any insurance company when he agreed to extend the insurance, and even if he only represented one insurance company it could not have been held liable to the plaintiff. He did not agree to insure the Lodge; he could not do so; and it could only be fairly inferred that he would procure insurance in an insurance company for them. Under such circumstances he became the agent of the Lodge.

Messrs. John F. Scragg and A. A. Vosburg, for plaintiff.

Mr. Robert Peck, for defendant.

Opinion by Kelly, A. L. J., August 7, 1905.

The defendant has been for many years engaged in the business of a general insurance agent in Peckville, in Blakely borough, where the plaintiff lodge has its meeting place. On January 15, 1890, the lodge placed \$200 insurance on its paraphernalia and other personal property in the defendant's agency and paid him \$7.00, the amount of the premium for three years; in 1893 they paid him the amount of the premium for another three years, and in 1896 they again paid him a three year premium which carried the insurance to January 15, 1899. So far there is no dispute.

Sometime in the latter part of January, 1899, a representative of the Lodge paid \$7.00 and got the following receipt: "January 15, 1899. Sheridan Lodge, No. 210, K. of P. To S. W. Arnold, General Insurance Agent, Peckville, Pa. Dr. To insurance in Union, term three years, \$7.00. Received payment, January 27, 1899." Signed, S. W. Arnold. The defendant does not deny the receipt of this money, but says that he has no recollection of having gotten it; that his books do not show it, and that he did not get any money at the time he gave the re-

ceipt, but that he gave it to the secretary of the Lodge, taking his word for it that he had received the money previously. For that \$7.00 no insurance was placed, and from January 15, 1899, until April 5, 1899, it seems that the plaintiff's property was uninsured. On that date a policy was issued for one year, and at its expiration another policy was issued for one year, the Lodge paying Mr. Arnold in April, 1900, for both policies, \$3.50 on the 4th and \$3.50 on the 11th. The second policy for a year was for \$200, and would expire on April 5, 1901.

In the meanwhile the members of the Lodge discovered that they had received no credit for the \$7.00 paid in January, 1899, and after considerable time had passed, they found the receipt already mentioned, and on March 13, 1901, a committee of three was appointed to wait upon Mr. Arnold and settle the dispute about the \$7.00. The committee called on him, showed him the receipt, and he then acknowledged that he had received the money and expressed his willingness to adjust the matter, although he said he had no recollection of it, and that his books did not show it. One of the committee asked him what he was going to do about it, whether he was going to give the money back or give them insurance for it, and he said he would give them an extension of insurance when the policy then in force would expire. The committee expressed their satisfaction with that arrangement and so reported to the Lodge at the next meeting which was held on March 20, 1901, and the report was accepted and the committee was discharged. There is some dispute in the testimony about this undertaking of the defendant to extend the insurance, but the verdict establishes the fact that he so agreed. He did not do so, and within a year after the expiration of the policy then in force, viz., on March 27, 1902, a fire occurred, the property of the Lodge was destroyed, and there being no insurance upon it, it was a total loss.

This action of trespass was brought against the defendant to recover damages on the theory that the defendant undertook, as agent for the Lodge, to extend the insurance, that he neglected to do so, and that as a result of such negligence the Society lost the insurance of \$200. We submitted the case to the jury subject to a reserved point: Whether there was any evidence in the case upon which the plaintiff was entitled to recover; and a verdict was rendered for the plaintiff.

The controlling question in the case is whether there is evidence

which will sustain the finding of the jury that the defendant became the agent for the plaintiff when he agreed that he would extend the insurance. If he did, he owed a duty to the plaintiff to use ordinary care to perform his obligation, and if he neglected to do so he would be liable for his negligence in the absence of contributory negligence on the part of the Lodge. We are clear the question of negligence and contributory negligence was properly submitted to the jury. Under the evidence it would have been manifest error to declare as a matter of law that the Lodge was guilty of negligence in not demanding from the defendant a policy for some eleven months after the last annual policy expired. The general rule is that negligence is a question of fact for a jury to pass upon: 21 Am. & Eng. Ency. of Law, 498; and we can see no reason why the general rule should not apply in this case. The only evidence we have of the defendant's negligence is the fact that he did not extend the insurance, but as we must always presume honesty of purpose rather than dishonesty, it may be fairly inferred that he simply forgot or neglected to do so. Such an inference is much more reasonable than one that he designedly and dishonestly kept the moneys of the Lodge.

And after careful consideration of the matter we have come to the conclusion that the evidence will support the finding of the jury that the defendant was the agent of the Lodge in the matter of getting an extension of the insurance. He was not acting in his capacity as an agent for any insurance company when he agreed to extend the insurance, and even if he only represented one company it could not have been held liable to the plaintiff. He had in his possession \$7.00 which had been paid to him as an insurance agent, for insurance which he did not furnish, and instead of giving it back at the time he acknowledged having it, he agreed to "extend the insurance," that is to say, he agreed that when the policy then in force should expire he would procure for them a new policy of insurance upon their property. If he had not been in the insurance business there would be no doubt but that such an undertaking would constitute him an agent for the Lodge. It seems to us that the fact that he was an insurance agent at the time was merely incidental. It was not intended that he should then and there issue or procure to be issued any policy of insurance, but that he should retain the money in his hands until the Lodge needed new insurance, when he

would apply it to the cost of the new insurance, which, incidentally he would procure from his own agency. He did not agree to insure the Lodge; he could not do so; and it could only be fairly inferred that he would procure insurance in an insurance company for them. Under such circumstances the jury could fairly infer that he undertook to act for the Lodge in this particular instance. We left the matter to the jury to determine under the familiar principle that not only facts but inferences from facts are for the jury to determine, in case the facts will support more than one inference, and while the question before us is not entirely free from difficulty, upon mature deliberation we are of the opinion that the evidence will support a verdict for the plaintiff.

The rule for judgment non obstante veredicto is discharged.

Upon the termination by the insolvency of a corporation of an executory contract with it, necessitating, in its execution, work, labor, and the expenditure of money for materials, machinery, etc., it is held, in *Griffith vs. Blackwater B. & L. Co.* (W. Va.) 69 L. R. A. 124, that the contractor is entitled to compensation for services rendered by him in pursuance of the contract until the date of its termination, and to reimbursement for his actual and necessary outlay and expenses, subject to a deduction of all sums paid him by the corporation, and of the value of materials, machinery, etc., on hand. The right to recover for services and expenses under a running contract with a corporation ended by its insolvency and dissolution is considered in a note to this case.

The power of the legislature to destroy or abolish counties recognized by the Constitution as organized and existing at the date of its adoption is denied in *McDonald vs. Doust* (Idaho) 69 L. R. A. 220.

The arrest at their own instigation, for the purpose of preventing a trial elsewhere, of persons accused of crime, in the county where the commission of the crime is commenced, and binding them over to await the action of the grand jury, are held, in *Hargis vs. Parker* (Ky.) 69 L. R. A. 270, not to prevent proceedings against them in the county where the crime is consummated, under a statute providing that, if the jurisdiction of any offense be in two counties, the accused shall be tried in the county in which he is first arrested.

In the Court of Common Pleas of Lackawanna County, No. 701, May Term, 1901.

EJECTMENT.

Jessie Hoysradt, et al. vs. Isaac B. Felts.

The service of the writ in an action of ejectment upon the defendant and a plea of the general issue raises the presumption of ouster by the defendant of his co-tenants and his adverse possession of the premises.

As an abstract legal proposition the possession of one tenant in common is ordinarily the possession of all. The inference is that he holds for all tenants in common until a hostile intention appears, and this must be disclosed by unequivocal acts fitted to appraise the co-tenant or co-tenants as to the existence of an adverse possession.

A writ in ejectment issued upon the day of the approval of the Act of May 8, 1901, P. L. 142. Defendant pleaded not guilty and went to trial upon the issue as thus framed.

Held: That having gone to trial upon the issue as framed, the defendant should not be heard to raise the question that the case was not at issue because the issue was not framed in accordance with the Act of May 8, 1901, P. L. 142.

An act of assembly becomes operative only from the time of its approval, or when it has otherwise become a law, according to the weight of the authorities. The most reasonable rule and one which is the least liable to work injustice, is that in the absence of evidence an act done on the same day as the law is passed will not be presumed to have been done previous in point of time to the passage of the act.

Messrs. Welles & Torrey, for plaintiffs.

Mr. John F. Scragg, for defendant.

Opinion by Kelly, A. L. J., January, 1906.

This case was tried before the Court without a jury, under the provisions of the act of 22d April, 1874, P. L. 109. In accordance with the requirements of the act we find the following

FACTS.

1. The lands described in the amended description filed in this case were, prior to the 9th day of June, 1881, in the possession of Isaac B. Felts, the defendant.

2. On the 9th day of June, 1881, the defendant, Isaac B. Felts, by deed conveyed to Jacob W. Hoysradt the lands described in the amended description filed in this case. The said deed was recorded in the Recorder's office of Lackawanna County on the 11th day of June, 1881, in Deed Book No. 8, page 158.

3. That Jacob W. Hoysradt is now deceased and his interest in the lands conveyed to him by the defendant is now vested in the plaintiffs, viz.: Jessie Hoysradt, Florence Hoysradt, Warren J. Hoysradt and Alice E. Hoysradt.

4. The lands described in the præcipe and writ in this case are the same lands described in the amended description filed in this case, the differences in description arising from clerical errors in the drafting of the deed from Isaac B. Felts to Jacob W. Hoysradt.

5. The defendant, Isaac B. Felts, was in sole and exclusive possession of the premises described in the præcipe, writ and amended description filed in this case at the time of the service upon him of the writ of ejectment.

6. The writ of ejectment in this case was served by the sheriff upon Isaac B. Felts on the 9th day of May, 1901, and the sheriff's return duly sworn to the 14th day of May, 1901.

CONCLUSIONS OF LAW.

1. The plaintiffs are entitled to the possession of the premises described in the præcipe, writ and amended description in this case.

2. The service of this writ in this case upon the defendant raised a presumption of ouster by him of his co-tenants, the plaintiffs, and his adverse possession of the premises, and no evidence has been adduced to rebut that presumption.

3. Judgment should be entered for the plaintiffs for the lands described in the writ as amended.

Counsel for the defendant has presented certain requests for conclusions of law, which we pass upon as follows:

1. If the plaintiff in this case can recover at all, it is by virtue of the deed from Isaac B. Felts to Jacob W. Hoysradt, deceased, of June 9, 1881, under whom the heirs claim, and if they can recover it would be but one-half of the undivided surface of the land described in the writ in this case, with reservations therein contained.

Answer: Affirmed.

2. This action is governed by the ejectment procedure act of 1901, P. L. 142.

Answer: Refused.

3. Under the ejectment procedure act of 1901, this case was not at issue when called for trial on September 25, 1905, and therefore no judgment or conclusion of law can be entered in the case.

Answer: Refused.

4. Under the deed of June 9, 1881, from Felts to Hoysradt, under which the plaintiffs claim as heirs of said Hoysradt, the said Hoysradt and said Felts became tenants in common to the surface of the land described, and for which the heirs of Jacob W. Hoysradt are now seeking to recover.

Answer: Affirmed.

5. The possession of one tenant in common is ordinarily the possession of all. The inference is, that he holds for all tenants in common until a hostile intention appears, and this must be disclosed by unequivocal acts fitted to appraise the co-tenant or co-tenants of the existence of an adverse holding.

Answer: Affirmed as an abstract legal proposition.

6. There is no evidence in this case of adverse holding by Felts as against the plaintiffs or Jacob W. Hoysradt, their ancestor. The plea of not guilty as entered is not the plea as directed to be entered by the act of 1901, and, therefore, is a mere nullity and not binding in this case. The plea of not guilty was the only plea recognized at law in an ejectment action prior to the act of 1901.

Answer: Refused.

7. The possession of Felts, being a tenant in common with Jacob W. Hoysradt, was the possession of the co-tenant Hoysradt and his heirs, and, therefore, without proof of ouster, the evidence discloses said Hoysradt in possession through his co-tenant in common Felts, of the land for which this ejectment was brought at the time of the inception of the suit, and if from the evidence court finds this to be so, the plaintiffs in this case cannot recover in this form of action, ejectment; their remedy being by partition, and an accounting and division of the lands.

Answer: Refused.

8. The plaintiffs to this suit or their ancestor, having been tenants in common with Felts for the land for which this action is brought,

cannot maintain ejectment without proof of actual ouster from the land of said Hoysradt or his heirs by the said Felts.

Answer: Refused.

9. Under the evidence in this case there is no surface of the land shown to belong to the plaintiffs in this case as described in the writ, the land described in the writ being covered by the exceptions and reservations contained in the deed appertaining to this portion of the land.

Answer: Refused.

10. There is not sufficient evidence in this case permitting the court to find actual ouster of the said Hoysradt by said Felts.

Answer: Affirmed. But the ouster is presumed by virtue of the service of the writ, and the plea of not guilty.

11. Under all the evidence in this case the plaintiffs cannot recover in this action of ejectment.

Answer: Refused.

12. If Jacob W. Hoysradt had a legal title arising from the fact that his name appears as the grantee in the original deed of June 9, 1881, as a tenant in common of this land, Felts, this defendant, has a right to hold Hoysradt's heirs, now claiming the land under this conveyance, at law responsible for one-half of the amount expended by said Felts in payment of taxes, repairs and legal outlays made on the land since the date of the said deed, giving the plaintiffs credit for any income from the said property, and the judgment in this case should protect the defendant for any taxes and legal outlays made.

Answer: Refused.

13. Under the evidence in this case the finding should be in favor of the defendant.

Answer: Refused.

DISCUSSION.

There is no difficulty in this case so far as the right of the plaintiffs to possession of an undivided one-half interest in the surface of the lands described in the writ, as amended, is concerned. There is an error in the description in the deed from Isaac B. Felts, the defendant, to Jacob W. Hoysradt, under whom the plaintiffs claim, in stating the second course as being in a southeasterly direction instead of a

northeasterly direction. It was clearly a clerical error on the part of the conveyancer, and under the testimony of the civil engineer called by the plaintiff there is no difficulty in locating and identifying the land.

It is urged on the part of the defendant that there can be no recovery in ejectment by the plaintiffs because under their own contention they are tenants in common with the defendant. It is true that the possession of one tenant in common is the possession of all under ordinary circumstances, and that without proof of ouster the ejectment will not lie; but in this case, while there is no evidence of actual ouster, the writ averred a wrongful detention of possession from the plaintiffs, and it was served upon the defendant who pleaded the general issue. The act of April 13, 1807, 4 Sm. L., 476, sec. 2, provides that the return of the sheriff of having served the writ upon the defendant, shall be evidence of such defendant being in actual possession of the premises; and it was decided in the case of Kelley vs. Kelley, 182 Pa., 132, that when the sheriff's return showed a service on the defendant, and there was a plea of the general issue, the plaintiffs were not bound to prove affirmatively any actual ouster from possession, but in the absence of any evidence to rebut the presumption of hostile possession, they could stand on the presumption which the act of assembly raised in their favor by the sheriff's return. So the defendant's contention upon this point is not sound.

It is also argued on the part of the defendant that the case was not at issue at the time of trial because the issue was not framed in accordance with the provisions of the act of May 8, 1901, P. L. 142. The writ issued upon the very day of the approval of the act, and the argument is that no evidence could be offered under the pleadings because the issue was made up under the old method of pleadings in ejectment, instead of under the method prescribed in the act. Having gone to trial upon the issue as framed we do not think the defendant should be heard to raise this question. The second section of the act of 1901 provides, "In all actions of ejectment hereafter to be brought, the plaintiff shall file a declaration, which shall consist of a concise statement of his cause of action, with an abstract of the title under which he claims the land in dispute, and in addition to the plea of 'not guilty,' now required by law, the defendant shall file an answer in the nature of a special plea, in which he

shall set forth his grounds of defence, with an abstract of the title by which he claims; and no action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed, nor shall any evidence be received on the trial of said action of any matter not appearing in the pleadings, subject to the power of amendment. The several courts of this Commonwealth shall have power, by general rule or special order, to fix the time within which the defendant shall file his abstract of title."

We haven't the plea now before us, but we presume it was filed by the defendant. The proper way to raise the question now under consideration would have been to refuse to plead until the plaintiffs had filed a declaration and abstract of title. Having voluntarily gone to trial upon the issue which he assisted in making by his plea of not guilty, the defendant had no right to complain upon this ground.

But, furthermore, their being no evidence as to whether the action was brought before or after the passage of the act we refuse to presume that it was brought before and therefore subject to its provisions. An act of assembly becomes operative only from the time of its approval, or when it has otherwise become a law, according to the weight of the authorities: 26 Am. & Eng. Ency. of Law, 2d Ed., 563, and notes. Said Mr. Chief Justice Black, in *Wartman vs. Phila.*, 33 Pa., 208, "An act of the legislature is passed, only when it has gone through all the forms made necessary by the constitution to give it force and validity, as a binding rule of conduct for the citizen. Whether it receives the signature of the governor, or remains in his hands unreturned for ten days, or being vetoed, is carried by two-thirds of both houses, its passage is dated from the time it ceased to be a mere proposition or bill, and passed into a law." There are some cases outside of Pennsylvania which hold that in the absence of evidence as to the precise time of the passage of an act that it will operate during the entire day of its passage, but none in Pennsylvania, and in the absence of Pennsylvania authority we are loth to adopt such a rule. It cannot be said that there is any presumption of fact that the suit was brought either before or after the passage of the act, nor is there any presumption of law one way or the other. According to legal fiction there are no fractions of a day, but practically there are. We think the most reasonable rule and the one which is the least liable to work injustice,

is that in the absence of evidence an act done on same day that a law is passed will not be presumed to have been done previous in point of time to the passage of the act.

As to the defendant's contention that he should be allowed for the taxes he paid on the land nothing need be said. He cannot have that passed upon in this action. While a bona fide occupant of land may be recompensed for his improvements under certain circumstances the defendant by his offer did not bring himself within this rule.

And now, January —, 1906, it is ordered and directed that this decision be filed in the prothonotary's office, and that notice of such filing by him be forthwith given to the parties, or their attorneys, and if no exceptions thereto are filed in said office within thirty days after said notice shall have been served, then judgment to be entered against the defendant and in favor of the plaintiffs for the lands described in the writ.

In the Court of Common Pleas of Lackawanna County, No. 50, January Term, 1906.

RULE TO OPEN JUDGMENT.

F. J. Johnson vs. Arthur Frothingham.

Applications to open judgments by default, and let the defendants into a defence, are appeals to the equitable power of the court, and should be made with reasonable promptness.

A defendant having knowledge of a judgment against him, for eleven years, is in no position to invoke the aid of a court of equity for relief against the collection of such judgment.

Unless a defendant can give a satisfactory excuse for an unusual delay, he is chargeable with laches.

Messrs. T. P. Duffy, Herman Osthaus and T. F. Wells, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Edwards, P. J., January, 1906.

This suit was commenced by summons in November, 1891. It was ruled out for arbitration by plaintiff, and brought back into court by appeal in January, 1893. Notice was subsequently served on defendant to file an affidavit of defense in accordance with our rule of court, and on October 6, 1894, judgment was entered for the want of

an affidavit of defence. The judgment was revived in 1899, and was again revived in 1904. The defendant now moves to open the judgment thus entered.

Defendant claims that the plaintiff by the arbitration proceeding had waived his right to an affidavit of defense, and our attention is called to the case of Duncan vs. Bell, 28 Pa., 516. Whether this case is modified by Horner vs. Horner, 145 Pa., 258, or whether it is sustained by National Bank vs. Stadelman, 153 Pa., 634, is of little consequence, because, in our opinion, our rule of court is sufficient authority for the entry of the judgment in question. The rule reads as follows: "When a case has been ruled out on arbitration by the plaintiff, and he would otherwise be entitled to an affidavit of defense, he shall not be entitled to judgment for want of the same under these rules, until after the case is brought back into the court by appeal or otherwise, in which case he shall be entitled to judgment, unless the defendant shall file such affidavit within fifteen days after demand therefor by the plaintiff, and service of such demand as provided in Rule 8."

If it should be conceded for the sake of argument that judgment was erroneously entered for the want of an affidavit of defence, and that our rule of court is invalid, the most that can be said is that the judgment was voidable and not void, the court having jurisdiction of the person and of the subject matter: Clarion R. R. Co. vs. Hamilton, 127 Pa., 1. This being the case, it was the duty of the defendant to move within a reasonable time to strike off or to open the judgment. In the case at bar the defendant is chargeable with great laches. He offers no reasonable excuse for the delay. The record shows that the suit was brought fourteen years ago, and judgment entered eleven years ago. The original summons and each scire facias were served upon the defendant, and he, therefore cannot plead want of notice. We see no way to relieve the defendant from the charge of laches. Plaintiff's counsel refers to numerous cases in his brief on this point. They are much alike in character. We shall cite only one case, and it shows the general trend of the decisions: Lytle vs. Hoover, 175 Pa., 408, where the supreme court says in a per curiam: "Applications to open judgments by default, and let the defendants into a defense, are appeals to the equitable power of the court, and should be made with reasonable promptness. In this case appellant's laches were inexcusable. His

petition was not presented until after the death of the plaintiff and the lapse of about eleven years after he knew that judgment had been entered against him for want of an affidavit of defence. Having failed to give any satisfactory excuse for this long and unreasonable delay, he was in no position to invoke the aid of a court of equity."

In addition to the foregoing arguments or reasons, we do not find much merit in the defendant's contention on the facts of the case. His defense does not invite the interposition of a court of equity.

The rule to open judgment is discharged.

In the Court of Common Pleas of Lackawanna County, Nos. 7, 8 and 9, January Term, 1905.

IN EQUITY.

Miles, et al. vs. The New-York, Susquehanna & Western Coal Co., et al.

The power vested in courts of equity to make orders for the discovery of facts material to a just determination of the issues, arising in said courts, should not be exercised for the convenience of a plaintiff in the preparation of his case.

Messrs. D. L. Rhone and S. J. Strauss, for plaintiffs.

Messrs. Willard, Warren & Knapp, for defendants.

Opinion by Edwards, P. J., January, 1906.

Defendants in these three cases are lessees or sub-lessees of the plaintiffs. A bill in equity has been filed in each case requiring the lessees to account for unpaid royalties on coal mined, the allegation being that owing to the introduction of improved machinery and the improved methods of preparing coal for market the defendants have sold coal from their various mines, particularly the pea, rice and buck-wheat sizes; on which no royalty has been paid for several years. Counsel have agreed to try the three cases together.

The lease provides that the party of the first part shall have at "all reasonable and proper times free and uninterrupted access to the mines for inspecting the mode of mining and the condition of the works." Under this clause of the lease counsel for both parties agreed on the form of an order by the terms of which the plaintiffs' engineers are permitted to enter defendants' mines to make surveys and to inspect

the "mode of mining and the condition of the works." This privilege of inspection is broad enough, in our judgment to allow an examination of the breaker and the method of preparing coal for market.

Plaintiffs' counsel also claim the right to make what is known as a car and breaker test, in advance of the trial. This right is denied by the defendants' counsel. For this reason plaintiffs' petition the court for an order directing the defendants to allow these tests to be made. The proposition is to permit the plaintiffs to take six cars of coal—two from each mines as they come out of the mines, containing presumably the average quantity of coal of the average quality as compared to the coal mined by the defendants for the past years under the lease; then to have the contents of the six cars properly inspected, weighed and classified; afterwards to run the coal through the breakers and to take or keep an account of the quantities of the different sizes of marketable coal produced by the operation. It being conceded that the plaintiffs have not been paid royalty on the prepared sizes of coal below chestnut, particularly on pea, rice and buckwheat, it is claimed that the result of the tests suggested would furnish a fair basis upon which, with other evidence, a computation may be made of the amount of unpaid royalty due from defendants to plaintiffs.

The contention of the plaintiffs that the right to make the tests mentioned may reasonably be inferred from the clause in the lease permitting an inspection of the "mode of mining and the condition of the works" is clearly untenable, and it needs no discussion by us. If the order prayed for can be made at all it must be made by virtue of the power and jurisdiction vested in courts of equity to make orders for the discovery of facts material to a just determination of the issues arising in said courts.

We are not now prepared to order the tests desired by the plaintiffs; nor shall we discuss the question of our power. If we concede the question of power, there are numerous reasons which suggest themselves to us why the order should not be made until it appears clearly that there is a necessity for it. As the matter stands now the order would be merely for the convenience of the plaintiffs in the preparation of their cases, and not because the tests desired are absolutely necessary for a just determination of the controversy between the parties.

Plaintiffs' motion is refused without prejudice.

In the Court of Common Pleas of Delaware County, No. 156, March Term, 1903.

**PETITIONS FOR APPROVAL OF BONDS IN PROCEEDINGS
TO RELOCATE RAILROAD LINE AND ALSO FOR
LEAVE TO WITHDRAW BONDS FILED IN THE PRO-
CEEDING FOR THE ORIGINAL LOCATION.**

In Re. The Philadelphia & Western Railroad Co.

A change of location of a route by a proposed railroad cannot be permitted after a jury appointed to assess the damage have filed their report, nor where it appears that the change is made for the purpose of bargaining with land owners for the cheapest route; but where an unforeseen and unavoidable condition, so far as the railroad is concerned, arises, the court will not only recognize the right to relocate, but will approve bonds for the new location. Hence, where, after the location of its route by a proposed railroad, another railroad has exercised its option and located its right of way in part on such location, the court will approve bonds for a relocated route.

The fact that security is not given to a grantee of respondents, whose rights and property will be affected by the location on the proposed route, does not affect the right of the railroad to file bonds as to respondents.

Mr. George T. Butler, for petitioners.

Mr. W. I. Schaffer, contra.

Opinion by Johnson, P. J., September 20, 1904.

On April 18, 1903, the Philadelphia and Western Railroad Company located its lines through the lands of John and William Sellers, in the Township of Upper Darby, Delaware County, Pennsylvania, and on Aug. 10, 1903, filed its bond, which was approved by the court. On June 7, 1904, the said John and William Sellers petitioned the court to appoint a jury to assess damages, which was done.

After the jury had been appointed and before a meeting had been held, the railroad company filed the present petition, setting forth:

"1. Your petitioner is a duly incorporated company under the General Railroad Laws of the Commonwealth of Pennsylvania, holding letters-patent under date of May 21, 1902.

"2. That your petitioner has by due corporate action surveyed, ascertained, located, fixed, marked and determined the route of the proposed railroad in the Township of Upper Darby, County of Delaware, and that the same passes through the lands now or late of John Sellers, Jr., and William Sellers, and that for the purpose of constructing said

railway your petitioner has measured off a certain strip of land belonging to the said John Sellers, Jr., and William Sellers, having a width of 60 feet, and extending in length about 2320 feet, which is more particularly described in the description and blue print hereunto attached and made a part of this petition; together with a parcel of land containing about 1 acre and 9-100th of an acre, more or less, for terminal purposes, and the above described strip and parcel of land containing 3 acres and 91-100ths of an acre, more or less; said parcel of land for terminal purposes, together with said strip, being more particularly described in the description and blue print hereunto attached and made part hereof.

"3. That your petitioner has been unable to agree with the said John Sellers, Jr., who is a resident of the County of Delaware, State of Pennsylvania, as to the damages sustained or likely to be sustained by the occupation of the land.

"4. That your petitioner is informed and believes and so states to your honorable court that William Sellers is a joint and co-owner of the aforesaid strip of ground and does not live within the County of Delaware, State of Pennsylvania, and, therefore, cannot be bargained with and cannot have a bond tendered to him within the County of Delaware, State of Pennsylvania, where the aforesaid land is situated.

"5. That, therefore, it is necessary that your honorable court shall allow the filing of a bond to the Commonwealth of Pennsylvania in an amount and with security to be approved by your honorable court, as is provided for in the Act of Assembly of the Commonwealth of Pennsylvania.

"Your petitioner therefore applies to your honorable court and prays that it be permitted to file a bond in such an amount and with such security as your honorable court may approve for the use of the person or persons who may be found to be entitled to the damages for the taking and appropriation of the aforesaid described land, or for damage or injury to such land."

Also a petition as follows:

"1. That your petitioner is a duly incorporated railroad holding letters-patent from the Commonwealth of Pennsylvania under date of May 25, 1902.

"2. That on April 18, A. D. 1903, your petitioner did file in your

honorable court (March Term, 1903, No. 156) a petition for leave to file its bond to the Commonwealth of Pennsylvania for the taking and appropriating of land of William Sellers, and that on June 20, 1903, your honorable court did fix the security to be entered in the sum of \$2500, which was subsequently entered, and that, on April 18, your petitioner did file in your honorable court (March Term, 1903, No. 157) its petition for leave to file its bond to the Commonwealth of Pennsylvania for the taking and appropriating of the land of John Sellers, Jr., and William Sellers, and that on said April 18 your honorable court did fix a bond to be filed in the sum of \$12,500, which said bond was subsequently filed by your petitioner; and that, on April 21, your petitioner did file in your honorable court (March Term, 1903, No. 160) its petition for leave to file its bond to the Commonwealth of Pennsylvania for the taking and appropriating of land of the Philadelphia & Delaware Railroad Company, and that subsequently, to wit, on June 20, your honorable court did direct that a bond in the sum of \$1,000 be filed, and the said bond was subsequently filed, and that, on April 30, your petitioner did file in your honorable court (March Term, 1903, No. 212) its petition for leave to file a bond to John Sellers, Jr., as security for entering upon his land, and on June 20 your honorable court did fix the amount of the bond at \$1,500, which was subsequently entered by your petitioner.

"3. That there has been no jury of view appointed up to the present time, and there has been no assessment of damages either by a jury of view or by a Common Pleas jury against your petitioner.

"4. That by reason of the fact that the Philadelphia and Delaware Railroad Company have built over a certain right of way owned by it, for a branch or siding of one of its extensions; and as said branch or siding would conflict with the route of your petitioner, it has been deemed wise by your petitioner and its board of directors to abandon the said routes set forth in the petitions hereinbefore referred to, to relocate its line or route.

"5. That, therefore, by due corporate action, your petitioner has abandoned the line, as set forth in the petitions for leave to file bonds herein referred to, and are not going to build its line of road over said parts of said lands.

"You petitioner therefore applies to your honorable court for leave

to withdraw its petition and to withdraw the bonds filed in the above matters, and that all proceedings therein and thereunder shall be decreed determined and ended."

An answer was duly filed as follows: "John Sellers, Jr., and William Sellers, the respondents, answering the above petition say:

"1. They pray that the petitioner may be put to due proof of the allegations in the second paragraph of its said petition, and until due proof is made thereof they deny, because they are not informed that the petitioner has by due corporate action surveyed, ascertained, located, fixed, marked and determined the route for its proposed railroad as set forth in the second paragraph of the said petition.

"2. The respondents calling to the attention of the court that the said petitioner has heretofore located another line of railroad upon their lands different from that set forth in the said petition, as will appear by the records of the said court, deny the right of the said petitioner to lawfully make a second location for its railroad upon their said property, no cause being alleged or set forth in the said petition therefor, and respectfully submit that your honorable court is without authority to approve a bond to the respondents as prayed for in the said petition.

"3. The respondent, John Sellers, Jr., avers that the said petitioner, the Philadelphia & Western Railroad company, has never attempted to agree with him as to the damage sustained or likely to be sustained by the occupation of the land described in the said petition.

"4. The respondent, William Sellers, denies that he cannot be bargained with and cannot have a bond tendered to him in the County of Delaware, State of Pennsylvania, and respectfully denies the authority of your honorable court to approve a bond to him until the said railroad company has endeavored to agree with him for the damages, and submits that any bond for his benefit should be given to him and not to the Commonwealth of Pennsylvania.

"5. The respondents deny the right of the said Philadelphia & Western Railroad company to locate, fix, mark and determine a route for its railroad upon their lands as set forth in the said petition, or the authority of your honorable court to approve a bond to them to secure them for the damages which will be due to them by reason of the appropriation of their lands, if the said petitioner has the right to appropriate them, unless the said petitioner shall also tender to the Mill-

bourne Mills Company a bond to secure it for the damages which will be done to it by the taking and appropriating by the said railroad company of the water right belonging to it and granted by deed of William Sellers and others to the Millbourne Mills Company, dated Oct. 26, 1885, and recorded in the office of the Recorder of Deeds of the County of Delaware, in Deed Book Z, No. 5, page 224, etc., the said water right being within the lines of the lands proposed to be condemned by the said petitioner, as appears by the survey, plan and description attached to its said petition."

The effect of the approval of the bonds is virtually a decision that the railroad company has the right to relocate its road. This the respondent denies, and a number of cases have been cited in which the courts have said that where there has been a location, it is a taking of land, fastens a servitude upon it and that the owner's right to have his damage assessed is complete.

It has also been held that after a jury appointed to assess the damage have filed their report, a change of location will not be permitted, nor will it be allowed where it appears that the change is made for the purpose of bargaining with land owners for the cheapest route.

But, as in this case, where an unforeseen and unavoidable condition, so far as the petitioner is concerned, arises, it would seem that the court would not only recognize the right of the company to relocate its line, but will approve bonds for the new location.

When the petitioner first located its road it could not tell whether the Cardington branch of the Pennsylvania Railroad would ever be built or not. Nor was it able to say where it would be located.

Since the location of the Philadelphia & Western, the Cardington branch has exercised the option which it held and located its right of way in part where the Philadelphia & Western had located its.

Unless the Philadelphia & Western can change its location it will necessitate the building of one railroad for quite a distance over and on the right of way of another. This would not only increase the danger to those who travel on and operate both railroads, but in all probability involve them in litigation and other complications.

The conditions and circumstances are such as to warrant the court in granting the request to file bonds for the relocated route.

The fact that the respondents do not in their answer claim that

they will be more inconvenienced or damaged by the new location than by the old adds to the reasonableness of the request. The answer asks the court not to approve the bonds of the petitioner until security has been given the Millbourne Mills Company, whose rights and property the respondents say will be affected by the new location. I am unable to see how that affects the rights of the respondent or interferes with the right of the petitioner to the change and the filing and approval of bonds as to them. I cannot permit the withdrawal of the bonds already given.

Counsel for petitioner may draw a decree permitting the filing of the new bonds. The bond to be in the sum of \$15,000, with surety to be approved by the court.

Counsel for respondents claim that they are entitled to counsel fees and costs incurred by reason of the application for the filing of new bonds.

The approval of the bonds is without prejudice to the right of the respondent to move for an allowance of counsel fees and costs should they see fit to claim them.

The statutory right to have damages for land the fee of which is taken for a public use assessed and paid in money is held, in *Hellen vs. Medford* (Mass.) 69 L. R. A. 314, to be a substantial right which, after the proceedings have progressed so far that the fee has passed, cannot be impaired by the passage of a statute authorizing the abandonment of the land, and directing that the fee shall revert in the former owner, and that fact be considered in reduction of the damages.

A woman whose husband is carrying on a partnership business with her money under an agreement that she shall receive all of his share of the profits of the business is held in *Morrison vs. Dickey* (Ga.) 69 L. R. A. 87, to be liable to account to him for the amount for which he rendered himself liable on account of the purchase of a machine by him and his partner for use in the business although she had given him special instructions not to purchase the machine, if it was in fact necessary or proper for the conduct of the business.

*In the Court of Common Pleas of Berks County, No. 43, March Term,
1905.*

**RULE FOR JUDGMENT FOR INSUFFICIENT AFFIDAVIT
OF DEFENSE.**

Reading Trust Co. vs. Boyer et al.

A contract "guaranteeing" payment of a debt "when due" is a contract of suretyship.

Unless restrained by the bankruptcy court, the creditors of one against whom a petition in bankruptcy has been filed are not debarred by the mere fact of its filing from instituting their actions in the state courts against him and prosecuting them to judgment.

Mr. Isaac Hiester, for plaintiff.

Mr. J. H. Rothermel, for defendant.

Opinion by Enderlich, J., April 22, 1905.

This action is brought upon an engagement in writing and under seal, whereby the defendants and each of them "guarantee" payment, "when due," of the principal and interest of a certain bond executed by the Temple Sand Company. The declaration avers its maturity and non-payment. Affidavits filed by or on behalf of the several defendants aver (1) that the bond is secured by the obligor's mortgage upon which plaintiff has issued a sci. fa. and obtained judgment; (2) that this security is believed to be ample to satisfy plaintiff's entire demand, etc.; (3) that defendants had no previous notice of the bringing of the suit; (4) that no previous demand was made upon them as guarantors; (5) that before institution of the suit a petition in bankruptcy was presented against one of the defendants, who filed his answer thereto, and that the proceeding is still pending.

It is well settled that a contract "guaranteeing" payment of a debt "when due" is not a general, but a special guaranty, broken by the fact of non-payment at maturity and suable by the creditor without first pursuing, or averring or showing the insolvency of, the principal debtor; in short, in substance a contract of suretyship: *Campbell vs. Baker*, 46 Pa. 243; *Reigart vs. White*, 52 Pa. 438; *Roberts vs. Riddle*, 79 Pa. 468; *Mizner vs. Spier*, 96 Pa. 533; *Zahm vs. Bank*, 103 Pa. 576. The fact, however, that judgment has been obtained against the principal, or that the debtor has control of other securities available for satisfaction of his demand, is no bar to an action against the sureties for pay-

ment of the same: *Commissioners vs. Canan*, 2 Watts, 107; *Building Association vs. Hetzel*, 103 Pa. 507. Upon payment of it, the sureties will be entitled to subrogation to the rights of the creditor in the judgment, etc.: see *Gardner's Administrators vs. Ferree*, 15 S. & R. 28. Neither is there any force in the averments of want of previous demand or notice of the action, "as the bringing an action is a sufficient request, in all these cases where the money is due and payable immediately:" *Gibbs vs. Cannon*, 9 S. & R. 198,—even where the contract is technically one of guaranty: *Overton vs. Tracey*, 14 S. & R. 311.

Upon the question of the effect of the bankruptcy proceedings upon the plaintiff's right to maintain this action, the court has been referred to no authority directly in point arising under the Bankruptcy Act of 1898. It seems very manifest that whatever effect it could possibly have must be limited to the one defendant involved in those proceedings. Section 16 of the statute expressly negatives any intent to permit the bankruptcy of one co-debtor to affect the liability of the remaining ones; and under the Act of April 4, 1877, P. L. 52, the entry of judgment against them would not prevent a subsequent judgment against him in the same action. But was the filing of the petition in bankruptcy against that one defendant a bar to the institution of this suit as regards him? or does it stand in the way of a judgment against him? It has been pointed out by counsel that section 11 (a) of the Act of 1898 does not prescribe at what stage an action shall be stayed upon the filing of a petition to declare defendant a bankrupt, and that, whilst it provides for the staying of actions pending at the time of the filing of the petition in bankruptcy, it is silent as to new actions brought pending such petition previously filed. The discussion of this latter feature of the enactment in *Collier, Bankruptcy*, at page 100, et seq., shows plainly how striking a departure it marks from the terms of previous ones. The rulings under these, therefore, can furnish no decisive precedents upon the question here presented. In the absence of an express prohibition or direction for a stay, at any stage, of actions instituted after the filing of a petition to adjudge the defendant a bankrupt and before consideration thereof, it may not, however, be improper to refer to the general reasoning involved in decisions upon earlier statutes as capable of throwing some light upon the presumable purpose of the law-making power. Under the Bankruptcy Act of 1841, it was

held, in *Hobart vs. Haskell*, 14 N. H. 127, that the filing by a party of his petition in bankruptcy did not itself bar an action of *assumpsit* against such party in a state court upon a claim provable in bankruptcy. Says the court:

"It does not appear, and we cannot know that anything farther will ever be done in the matter of the petition in bankruptcy. It may be abandoned and never come to a hearing. And if there should be a hearing, the district court may not declare the petitioner a bankrupt. In that event, there will be no assignee in whom will be vested all the property and rights of the petitioner. The filing of the petition is merely an effort by the petitioner, an expression of his intention that the management of his assets shall, through the intervention of the district court, be transferred to an assignee, who shall appropriate his property to the payment of his debts. But if the district court should, at a proper time for passing upon the matter, refuse to entertain the petition, the plaintiff's right would be injured beyond remedy, in case the property of the defendant had been attached by process issuing from the Common Pleas; for he would not only lose his attachment here, upon the dismissal of his action, but he would not even have an opportunity of coming in with other creditors for a pro rata distribution of the defendant's property by the decree of the district court. Upon these views, there would be sufficient reasons why this action should not be dismissed, without resorting to the provisions of the Bankrupt Act. The defendant moves that the action be dismissed, because he has submitted himself to the jurisdiction of another tribunal. He thus seeks to deprive the plaintiff of the remedy given him by law, by an act to which the plaintiff is not a party, and which he has in no form assented to."

All this is, of course, not literally descriptive of the case here arising—some of it not accurately applicable to the terms of the Act of 1898. Yet, *mutatis mutandis*, it suggests much which is not without present and persuasive force; and to it ought to be added that the right to bring the action may be of importance to the creditor in order to avoid the bar of the statute of limitations, as well as in order to ascertain the amount due him with a view to proving the same in the bankruptcy proceedings. As opposed to the considerations thus making in favor of the creditor's right to sue and obtain judgment, there seems

to be nothing but this, that a debtor ought not to be harassed with a multiplicity of proceedings, which might result from an effort on the part of his creditors, in view of a possible denial of his ultimate discharge, to secure prior liens upon subsequently acquired property—and that, in the event of his adjudication and discharge as a bankrupt, his creditor will have gained nothing by the action and judgment beyond the liquidation of his claim: see Collier, Bankruptcy, 102. The liquidation of the creditor's claim has already been referred to as conceivably of importance. That the plaintiff cannot saddle the bankrupt estate with his costs incurred in such action seems clear under section 53 (3). If he chooses, at his own expense, to proceed for the ascertainment of his demand, there would appear to be no good reason why he should not be permitted to do so. The argument as to the harassing of the debtor, the multiplicity of suits, the encouragement of a race of diligence among creditors, etc., can be a legitimate one only as relating to actions unduly multiplied and brought or conducted oppressively. In such circumstances, however, the power of the bankrupt court as a court of equity supplies complete and adequate means of protecting the bankrupt: Collier, Bankruptcy, 103-104; *In re. Hornstein*, 122 Fed. Repr. 266. The conclusion would seem to be that, unless restrained by the bankrupt court, the creditors of one against whom a petition in bankruptcy has been filed are not debarred by the mere fact of its filing from instituting their actions in the state courts against him and prosecuting them to judgment: Collier, Bankruptcy, 104. And this conclusion finds some support in the provision of section 63 (5), declaring as provable in bankruptcy "debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge," etc. Section 11 (a) directs the stay of suits pending at the time of filing the petition in bankruptcy, but fixes no precise point at which they are to be stayed. Neither, manifestly, does the filing of the petition operate ipso facto as a stay. There is, therefore, on this point room for the exercise of a discretion on the part of the court; and the provision referred to in section 63 (5) apparently contemplates its exercise in such a way as to permit the plaintiff to go as far as the procuring of judgment even in those actions which section 11 (a) says shall be stayed upon the filing of the petition in bankruptcy. If so, there can certainly be no objection to permitting a plaintiff to go

to the same length in an action brought after the filing of the petition, the act neither forbidding the institution of such action nor directing it to be stayed. It need hardly be added that when it comes to executing a judgment thus obtained against one as to whom a petition in bankruptcy was filed before institution of the suit and is still pending, a question will arise which will be controlled by considerations and in view of provisions of the Bankruptcy Act and possibly by circumstances very different from those here involved. The power to control the execution of its judgment, however, always resides in the court that enters it, and therefore the possible or probable necessity of exercising that power does not stand in the way of the entry of the judgment: *Colwell vs. Rockwell*, 100 Pa. 133. That matter is not now before the court. All that is presently decided is, that the presentation to the proper federal court of a petition to declare a certain person a bankrupt, the filing of his answer thereto, and the pendency of the questions thus raised, do not constitute a bar to the institution and prosecution to judgment of an action in a state court against such person by another creditor.

There would thus appear to be nothing in these affidavits negating the right of plaintiff to the judgment it asks for principal and interest against all the defendants, and therefore, and to that extent, the rule to show cause is made absolute.

Playing pool under an agreement that the one losing the game shall pay for the use of the table is held, in *Hopkins vs. State* (Ga.) 69 L. R. A. 117, to be betting at a pool table within the meaning of a statute making such betting a misdemeanor.

A horse block or stepping stone of ordinary size, placed at the edge of the sidewalk to facilitate access to and egress from carriages in the street, is held, in *Wolff vs. District of Columbia* (App. D. C.) 69 L. R. A. 83, not to be an obstruction of the walk so as to render the municipality liable for injuries caused by a traveler falling over it.

A combination of two or more persons to injure one in his trade by inducing his employes to break their contract with him, or to decline longer to continue in his employment, is held, in *Employing Printers' Club vs. Dr. Blosser Co.* (Ga.) 69 L. R. A. 90, to be actionable if it results in damage.

In the Court of Common Pleas of Luzerne County, No. 166, October Term, 1904.

MANDAMUS.

County Commissioners vs. County Controller.

The county commissioners alone, with the approval of the judges, as provided in the Act of April 19, 1895, P. L. 38, have a right to make modifications in a contract for the erection of a county court house. They cannot delegate any authority in reference thereto to the county controller, and he has none by common law, or under the Act of June 27, 1895, Sec 1^o, P. L. 403. Hence, where the contract provided that alterations might be ordered by the architect, "in writing, with the counter signatures of the county commissioners and the controller," held, that the controller had no power to countersign the order.

W. S. McLean, County Solicitor, for plaintiffs.

Mr. Edwin Shortz, Jr., for defendant.

Opinion by Lynch, P. J., July 2, 1904.

For the following reasons, among others, the prayer for a peremptory mandamus must be denied:

The counties of this Commonwealth have capacity, as bodies corporate, to make such contracts as may be deemed necessary and proper for certain purposes. These powers of the county are exercised by the county commissioners, who have charge of its seal. The title to the court house, jail and lands thereunto belonging is vested by law in the county and all suits by it must be brought and conducted by the commissioners, and in all suits against it, process is served upon and defence made by the commissioners.

The commissioners, having first obtained the approbation of two successive grand juries and of the Court of Quarter Sessions, entered into a written contract with Wilson J. Smith, on July 31, 1902, to erect a court house in the City of Wilkes-Barre.

This contract was approved by the judges, as provided by the Act of April 19, 1895, P. L. 38. After due notice published by the controller, as directed by the commissioners, inviting proposals, bids were received and the contract for erecting the building was awarded to Mr. Smith. Thereupon he proceeded with the erection of the building as provided in the contract. The architect, during the progress of the work, prepared plans and elevations in modification of the original, thereby providing for alterations and additions in said court house,

and the architect, in writing, with the counter-signature of the county commissioners, ordered the contractor to erect the building according to the modified plans, which were valued by the architect, in the manner provided by the original contract, at the sum of \$19,503. These changes were approved by the judges of Common Pleas April 23, 1903.

The contractor, in obedience to this order, put in place the foundations of this part of the building, and has purchased necessary material for the construction thereof. Upon request made by plaintiffs to countersign the order of the architect, the defendant has refused and still refuses to countersign the same, by reason whereof all payments to the contractor have been stopped and all work suspended for several months.

The substance of the return is that under section 10 of the Act of 1895, P. L. 403, it is part of the discretionary power of the controller to approve or refuse to approve the purpose of any proposal to make the county party to a contract involving expenditure exceeding \$100, and secondly, said alterations, if carried out, would involve expenditure exceeding \$100; and thirdly, in the exercise of his discretion, he refuses to approve the purpose of the contract, and accordingly refuses to countersign the written order of the architect.

In the original contract it is provided, "alterations may be ordered at any time before completion of the work by order of the architect, in writing, with the counter-signatures of the county commissioners and the controller, which alterations shall in no way affect or make void this contract."

We are of opinion that, notwithstanding the contract reads as above quoted, it was no part of the power, duty or right of the controller to countersign with the commissioners. The commissioners, as above stated, for certain purposes, are the duly authorized representatives of the county. They alone had the right to execute this contract, and had no legal right to delegate a part of their functions to the controller, and when it was found necessary, as it was, to make the alterations in the erection of the building, the commissioners alone, with the approval of the judges, as provided in Act of April 19, 1895, were the persons who had a right to enter into a contract for these changes.

To illustrate our view of this subject, suppose that the contract had provided that the order of the architect upon the contractor to

proceed with alterations and repairs should be countersigned by the county commissioners and some other person, other than the controller, such a delegation of the duties of the county commissioners would be *ultra vires* and void. The right, therefore, of the controller can rise no higher than the right of such other person unless it be derived from some source other than the contract, and this is conceded by the controller and his counsel in the case.

The controller can exercise no common law duties. His power and authority is derived from the Act of 1895. If under the provisions of said act the controller has any right whatever to approve or disapprove the act of the commissioners in erecting a court house, he exercised that power when he published notice inviting proposals for the erection of the building. If after such contract had been entered into by the commissioners and the builder, with the approval of the court, and part of the building had been constructed, it were necessary under section 10 of the Act of 1895 to publish notice and make a new contract with the lowest bidder, who might be a different contractor, with all the consequences that would follow, the erection of the building would be indefinitely postponed, and instead of being a beautiful and symmetrically proportioned building, it would be a patchwork.

As we view the question, all such additions, modifications and alterations as named above, are to be carried on under the terms and conditions of the original contract between the commissioners and Mr. Smith, the contractor. It is no part of the duty or right of the controller to countersign the written order of the architect directing the contractor to erect the building according to the modified plans or to countersign the same.

The writ is refused.

Failure of the officers of a savings bank to make a physical comparison of the signature on a draft presented with the depositor's bank book with his signature on file is held, in *Kelly vs. Buffalo Savings Bank* (N. Y.) 69 L. R. A. 317, to render it liable for paying out money on a forged draft, in the absence of some unusual and pertinent excuse which will justify such failure.

In the Orphans' Court of Philadelphia County, No. 129, October Term, 1882.

EXCEPTIONS TO ADJUDICATION.

Stokes' Estate.

Under the Act of June 4, 1879, P. L. 88, a bequest by a testatrix of "all the rest, residue and remainder of my estate of every nature and kind, real, personal and mixed," is a valid execution of a general testamentary power of appointment.

Messrs. Melick, Potter & Dechert, for exceptants.

Messrs. L. S. Landreth, F. B. Stockley and N. D. Miller, contra.

Opinion by Penrose, J., January 20, 1906.

Testator died August 14, 1879, and by his will, *inter alia*, provided for the payment by his executors of an annuity of \$5000 to his wife, Mary K. Stokes, during her natural life. And all the residue of his estate he disposed of as follows, viz.: one-fifth part thereof to his son, James M. Stokes, absolutely. And the remaining four-fifth parts or shares he gave to his wife, Mary K. Stokes, his son, James M. Stokes, and his son-in-law, Theodore M. Allen, in trust, to pay over the income of one-fourth part thereof to each of his daughters, Anne H., Mary Louise, Elizabeth K. and Helen, during their natural lives, etc. "And upon their respective deaths to pay over, transfer and convey the principal of their respective shares aforesaid to such persons and for such interests as they by their last wills and testaments respectively appoint."

Testator's wife and all of his children survived him and are still living, except his daughter, Anne H., who died March 20, 1905. She, by her will, first directed all her just debts and funeral expenses to be paid. She then gave numerous specific bequests and disposed of the residue to her sisters and three charities, providing as to the latter: "All the rest, residue and remainder of my estate of every nature and kind real, personal and mixed, I give, devise and bequeath as follows, etc., etc."

There seems little room for argument in this case. The testator gave a share of his estate in trust for each of his daughters, for life, and at their deaths, respectively, the principal to "such persons and for such estates as they by their last wills and testaments respectively appoint."

The Act of June 4, 1879, P. L. 88, which is copied from the English Wills Act, provides that a general devise of real estate of a testator or a general bequest of his personal estate shall extend to any real or personal estate in which he "may have power to appoint in any manner he may think proper," and shall "operate as an execution of such power, unless a contrary intention shall appear by the will."

There could be no more general power than this testator has given to his daughters. It is the precise equivalent of a power to "appoint in such manner as they may think proper," and falls directly within the terms of the act. Of course, the law was entirely different before the passage of the act; but the very purpose of the act was to produce a change and to correct the inconveniences and mischiefs previously existing. If its meaning were obscure, it would be construed liberally, and to suppress the mischiefs which led to its passage; but it is free from ambiguity, and no interpretation contrary to the plain sense of the words is permissible. See Farwell on Powers, 7, 182, 183, etc., etc.

The daughters' will, though not referring to it, was a valid execution of the power.

Exceptions dismissed, and adjudication confirmed absolutely.

In the Court of Common Pleas of Luzerne County, No. 1099, October Term, 1904.

CASE STATED

Newton vs. Luzerne County.

The fees of a deputy constable for serving a subpoena are the same as those of the sheriff for like service under the Act of July 11, 1901, P. L. 663.

Mr. J. J. O'Donnell, for plaintiff.

Messrs. W. S. McLean, Jr., and Edwin Shortz, Jr., for defendant.

Opinion by Halsey, J., November 16, 1904.

John Newton, the plaintiff, is a deputy constable of the Tenth ward of the City of Wilkes-Barre. He was appointed on April 7, 1902. That in the case of Commonwealth vs. B. Sutton, No. 291, June Sessions, 1902, the County of Luzerne was made liable for the costs of prosecution in said case. The plaintiff served one subpoena for the Commonwealth containing two names and traveled twelve miles. The

county has paid him the sum of 30 cents for the service of the subpoena, namely, 15 cents for each person, and allowed him 6 cents a mile for travel, or 72 cents, making a total of \$1.02.

The plaintiff contends that he should be compensated for the service performed as is provided in the Act of July 11, 1901, entitled "An act to regulate and establish fees to be charged by sheriffs in this Commonwealth," etc.

This act provides that the sheriff shall be allowed fees for the service, as compensation, of \$1 for the first service and 50 cents for every other party served in addition to mileage. By the same act, the mileage allowed the sheriff is 10 cents a mile for each mile actually traveled and necessary, the same to be allowed on each separate writ, rule, order, decree, process or service performed, provided that he shall not receive more than one mileage where the plaintiff and defendant or plaintiffs and defendants in two or more contemporaneous writs are the same.

In many cases it has been held that a subpoena may be served not only by the sheriff, but by any other competent person. That the compensation in fees for such service shall be the compensation fixed by law to be paid to the sheriff for the service of subpoenas: *Coleman vs. Hess*, 1 *Browne*, 274; *Young vs. Harold*, 7 *Kulp*, 285; *Boyle vs. Luzerne County*, 8 *Kulp*, 141; *Com. vs. Neeley*, 2 *Ches. Co. Reps.* 105.

Judgment is therefore entered in favor of the plaintiff, John Newton, and against the defendant, the County of Luzerne, for the amount agreed upon in the case stated, if there should be a finding in favor of the plaintiff, viz., for the sum of \$2.70.

A plaintiff in an equity case, who is in contempt of court for refusing to obey an order which can be enforced by mandamus, is held, in *Campbell vs. Justices of Superior Court (Mass.)* 69 *L. R. A.* 311, to have no absolute right to proceed with the trial.

A depositor in a savings bank is held, in *Chase vs. Waterbury Savings Bank (Conn.)* 69 *L. R. A.* 329, not to be estopped to hold the bank responsible in case it negligently pays the deposit to an unauthorized person, by the fact that he also is negligent in the care which he takes of his bank book.

*In the Court of Common Pleas No. 1, of Philadelphia County, No.
3777, September Term, 1905.*

RULE TO QUASH PROCEEDINGS.

Commonwealth vs. Tuchman.

On Oct. 6, 1905, a rule for a sheriff's interpleader was made absolute in a case pending in C. P. No. 5 of Philadelphia County. On Oct. 21 the claimant in the rule filed his bond as required by the Act of May 26, 1897, P. L. 95, but did not file his statement until Nov. 13, 1905. On Nov. 10, 1905, the plaintiff in the case in C. P. No. 5 brought an action in C. P. No. 1 on the interpleader bond, which the defendant moved to quash on the ground that it was prematurely brought. After the argument of this rule in C. P. No. 1, C. P. No. 5 discharged a rule to strike off the statement filed on Nov. 13, 1905. Held, that the rule to quash filed in C. P. No. 1 should be made absolute.

Mr. Louis Goodfriend, for plaintiff.

Mr. B. D. Oliensis, for defendant.

Opinion by Beitler, J., January 10, 1906.

On October 6, 1905, in a case pending in Common Pleas No. 5, that court made absolute a rule for a sheriff's interpleader in which one Tuchman was claimant. On October 21 the claimant filed his bond as required by the Act of May 26, 1897, P. L. 95, but he failed to file the statement required by the act until November 13, 1905. On November 10 the plaintiff in the case in Common Pleas No. 5 brought this action on the interpleader bond, and now the defendant moves to quash the proceedings in this court on the ground that the suit was prematurely brought, there being no judgment against the claimant in Common Pleas No. 5.

While there is a *dictum* in *Commonwealth vs. Beary*, 9 Pa. Superior Ct. 246, wherein Judge Porter said, "the entry of judgment on a rule to show cause was proper and good practice, although perhaps unnecessary," the later case in the Supreme Court, *Barndollar vs. Fogarty*, 203 Pa. 617, seems to rule the point the other way.

Since the rule was argued in our court, Common Pleas No. 5 has discharged a rule to strike off the statement filed on November 13, 1905, and now the interpleader will go on to a determination in that court.

The rule is made absolute.

In the Court of Common Pleas of Lackawanna County, No. 778, May Term, 1905.

DEMURRER TO PLAINTIFF'S STATEMENT.

Firemen's Relief Association vs. City of Scranton.

An ordinance in accordance with the Act of Assembly approved June 28, 1895, P. L. 408, is not in violation of Article IX, Section 7, of the constitution prohibiting municipal appropriations for "any corporation, institution or individual."

Nor is such an ordinance in violation of Section 18, Article III, of the constitution, which prohibits, except for pensions and gratuities for military services, all appropriations for charitable, educational and benevolent purposes to any person, community, denominational or sectarian institution, corporation or association.

The fund raised by virtue of such an ordinance is not a pension or gratuity bestowed as a mere charity or benevolence, but rather something for important municipal services of which the public has the benefit.

Messrs. Vosburg & Dawson, for plaintiff.

D. J. Davis, City Solicitor, for defendant.

Opinion by Newcomb, A. L. J., March 5, 1906.

This action is assumpsit. The defendant has demurred to a statement disclosing the following

FACTS.

1. By the act of June 28, 1895, P. L. 408, a tax was imposed upon the business done in this state by foreign fire insurance companies, of which one-half the net amount was directed to be paid over by the state to the treasurers of the several cities and boroughs in proportion to the amount of tax derived from each as shown by the annual reports of the Insurance Commissioner.

2. By ordinance approved March 17, 1898, entitled, "An ordinance to provide for the annual transfer of a certain fund received from the state treasury as revenue from the foreign insurance companies agreeably to an act of assembly approved June 28, 1895, to the Scranton Firemen's Relief Association," it was enacted:

"Sec. 1. Be it ordained, etc., that all such sums of money as may be received by the City Treasurer in accordance with the Act of Assembly, approved June 28, 1895, be, and is hereby declared to be received for the benefit of the Scranton Firemen's Relief Association."

"Sec. 2. That the City Treasurer is hereby directed to enter such sum on the receipt thereof, under a special account and to report the said amount annually to the City Clerk, who is hereby directed to issue

warrants therefor in favor of the treasurer of the Scranton Firemen's Relief Association immediately after the receipt thereof and on report to him of the City Treasurer."

3. June 6, 1898, the Scranton Firemen's Relief Association was incorporated by decree of this court. Its articles of association bear date of April 1, 1898, and it nowhere affirmatively appears that it had any actual existence prior to that date, and, therefore, when the ordinance was passed. Its purpose, as stated in the charter, is "to provide for the maintenance of a society for beneficial or protective purposes to the members from funds collected therein." Its qualification for membership is not defined by the charter, but section 3 of the By-Laws provides that "the requisite qualifications for membership are that the beneficiary shall be or have been an active member of the Fire Department of the City of Scranton, and a citizen of the Commonwealth of Pennsylvania."

4. By Section 2 of its By-Laws the object of the association is stated to be "the accumulation of a fund from the annual dues of its members, legacies, bequests, gifts and other sources for the purpose of relieving firemen who may be disabled through accident while in the performance of their duties as active firemen of the City of Scranton, and in case of death for the benefit of a member's widow, orphans or estate."

5. At the time the ordinance was passed, and until 1901, Scranton was a city of the third-class, but whether its fire department was a voluntary or a paid organization does not appear.

6. In pursuance of the ordinance the receipts from the tax in question for the years 1896 to 1899 inclusive were paid over by the city to the plaintiff. After that date the treasurer refused to make report of the fund to the clerk, and pending mandamus proceedings to compel him to do so the ordinance was repealed by another, approved October 24, 1903. The fund in dispute, therefore, is the amount of receipts from the tax for the years 1900 to 1902, inclusive, still in the city treasury, as follows:

For the year 1900.....	\$2,579.37
For the year 1901.....	3,023.67
For the year 1902.....	3,245.72
Total	<u>\$8,848.76</u>

which the plaintiff claims, with interest on the several sums from the date when they respectively came to the hands of the city treasurer. These dates, however, do not definitely appear.

The demurrer was argued upon the assumption that the plaintiff corporation had an associate existence under its present name prior to the passage of the ordinance under which its claim is made. While it is doubtful practice to supply such fact in that way we will in this instance assume it as counsel have done, and suggest that the statement be amended in that particular by agreement.

The facts, then, give rise to several questions:

1. Was the ordinance void as against any provision of the Constitution?

2. Was it a valid appropriation of the city's revenues so far as they were to accrue in the future, or only for so much as was to accrue for the current year of its passage?

3. If valid for the future did it create a vested right which attached to each annual payment of the tax the moment it came to the custody of the city treasurer, or was it merely an executory gift revocable at any time so long as the money had not been actually transferred to the plaintiff's hands?

When the case was before us on mandamus proceedings it was contended by the city treasurer that the ordinance violated Article IX., section 7, of the Constitution prohibiting municipal appropriations for "any corporation, institution or individual." Without undertaking to decide that question judgment was given for the defendant on other grounds. On appeal the judgment was affirmed on the ground that the ordinance had been repealed, and, therefore, the specific duty of the treasurer sought to be enforced had ceased to exist: *Com. ex rel., etc., vs. Barker*, 211 Pa., 610.

But, incidentally, the appellate court passed upon this constitutional objection and said it was untenable. While strictly speaking the decision of this question was not essential to the judgment rendered, yet we regard what was said on the point as an authoritative expression of opinion which is decisive against that position of the city.

Another question is now raised, viz., whether the ordinance is in violation of Section 18, Article III. of the Constitution, which prohibits, except for pensions and gratuities for military services, all appropria-

tions for charitable, educational and benevolent purposes to any person, community, denominational or sectarian institution, corporation or association.

So far as we are aware this section has been judicially construed only in cases concerned with the management of the public schools or the use of common school property, and they throw no light on the particular question here, that is, whether the effect of this ordinance was to appropriate public money to uses which are charitable or benevolent within the meaning of the words as used in this section of the Constitution. The exception, in favor of pensions and gratuities for services of a particular character necessarily strengthens the theory that for all other purposes they were intended to be prohibited. That the fund in question is devoted to pensions or benefits in the nature thereof can hardly be denied. It was in effect so characterized by the Supreme Court in *Com. vs. Barker, supra*. It was there held that the case was strictly analogous with *Com. vs. Walton*, 182 Pa., 373, which affirmed the right of the city of Philadelphia to create a pension fund out of its general revenues for the benefit of its police officers and their families. The creation of such pension fund, said the court, greatly subserves an important municipal function, and that is not within the prohibition of Section 7, Article IX, of the Constitution. What might have been said of section 18, of article III., may be doubtful. It was neither referred to by counsel nor considered by the court. The nature of the case is such that its silence on that point is not without significance. The fact is at least consistent with the inference that the minds of all concerned were free from doubt on that score. For if this section of the constitution is violated here it was equally so in the Walton case, and the latter was erroneously decided. While in that case the fund was called a pension fund, it is evident that what the Court had in mind was not a pension or gratuity bestowed as a mere charity or benevolence, but rather something in recognition of and compensation for important municipal services of which the public has the benefit. In the case at bar the insurance companies from whom the tax is derived share in the benefits arising from the services of the firemen. We are looking at the case as though the statute directed the money to be paid to the association for the relief of disabled firemen, without the intervention of any ordinance. For if the legislature may not give the money to the association, the city, which is its creature, cannot.

A case arose in New York under such a statute and constitutional restriction which the court of appeals discussed in an interesting and instructive opinion by Finch, J. The statute was upheld on the ground that essentially the appropriation was compensatory and not a gratuity, nor a benevolence. *Firemen's Fund vs. Roome*, 93 N. Y., 313.

"When the state," said the court, "takes from the public treasury a sum of money and gives it to a corporate body for the relief of deserving beneficiaries it does one of two things. It either bestows a charity, or recognizes and discharges an obligation due from it to the recipients. The former it cannot do except in specified cases. The latter it may always do, for the constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service," etc., etc.

Taylor vs. Mott, 123 Calif., 457, is cited as maintaining a different doctrine. A careful analysis of the case, however, shows that it is not in conflict with the New York case. The statute in question was held to be invalid because it sought to create a municipal liability where none had previously existed. How? By requiring the municipality to disburse its funds "among those who have never performed fire service or any other service for that particular municipality." "If this act is upheld," says the court, "all such from the four corners of the state might congregate in a single city, establish a residence there, compel the local governing authority to enroll them as exempt firemen, and, without ever doing anything as a legal consideration therefor, claim and receive a part of the funds of such city." The absence of the notion of obligation and of the element of compensation for services rendered the community is made the turning point of the decision. Instead of being in conflict, then, with the New York case it is in entire harmony with it, and we are of opinion that there is nothing in the constitutional objection to prevent a recovery by the plaintiff.

Second. We think that the act of 23d May, 1889, P. L. 277, Art. VI., Sec. 10, requiring annual appropriations, does not apply. That has reference to the appropriation of the city's ordinary revenues the creation and collection of which lies with the city. They are created for the purpose of meeting ordinary expenses. The latter are capable of being estimated. The several departments are required to make and

present to councils such estimates each year before the annual appropriations are made. It is in this connection and for these expenses that the councils were required to make annual appropriations. It would be impossible to estimate this fund annually for the current year. It could be done only for the year last past. That is not what the act says. Hence, we hold the appropriation was valid for the several years in question in this case.

Third. Did it create a vested right? When the case was here before we were of opinion that if the ordinance were valid in form it amounted only to an executory gift. If so it would not be enforceable and such claim as the plaintiff might otherwise assert would be effectually ended by the repealing ordinance. But this conclusion rested upon the theory that the appropriation was a mere gratuity unconnected with any notion of compensation or duty owing by the city to the beneficiaries of the fund. This theory is abandoned as untenable. The Supreme Court having decided that in form the ordinance was adequate to appropriate the money, we can see no reason why the plaintiff is not entitled to it. The ordinance was not repealed until proceedings were begun to compel the performance of the duty imposed by it upon the custodian of the money. That was all the plaintiff could do at that time. If our conclusions are right the plaintiff was entitled to have the ordinance complied with while it was in force. If so he was entitled to have the money immediately upon its receipt by the treasurer. There remained nothing for either party to do in order to perfect the plaintiff's right of property and present enjoyment. By the terms of the ordinance the money was received not for the city, but for the plaintiff. It wasn't a fund created by the city by setting it apart out of its general revenues. It never went into its general funds. The plaintiff's right wasn't impressed, so to speak, upon this money after it came to the city's hands, but was attached to it when it came. It was the plaintiff's money in the custody of the city as a *quasi* trustee. The duties of the treasurer and clerk were not essential to the plaintiff's right. They were matters of mere administration and accounting. The city could by another ordinance terminate the grant at any time, but it could not in that way divest the plaintiff's title to so much of the fund as had then been realized, not for itself, but for the plaintiff.

The plaintiff is entitled to judgment. The only uncertainty in the

case is as to the amount of interest with which the city is chargeable. As above noted the papers in the case fail to show when the payments were received from the state. It can only be said with certainty that all the moneys in dispute were in the city treasury when the repealing ordinance was passed, to wit., October 24, 1903. We can only allow interest from that date. But this will be done without prejudice to the right of the parties to have the figures corrected if they choose to amend the plaintiff's statement by agreement of counsel in respect to the date of interest.

Judgment is accordingly entered on the demurrer against the defendant and in favor of the plaintiff for ten thousand one hundred and 86/100 dollars (\$10,100.86).

In the Court of Common Pleas No. 5, of Philadelphia County, No. 3060, September Term, 1904.

IN EQUITY.

*EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSION
OF LAW*

Shermer vs. Philadelphia Lodge, No. 20.

A by-law of a beneficial association, constituting a term in the contract of membership, which provides that "A member who is more than thirteen weeks in arrears for dues shall be debarred from all sick and funeral benefits, voting or speaking on matters before the lodge, for the space of four weeks after all arrearages have been paid, said suspension to be announced by the commander," is valid, and will be enforced.

Mr. C. Davis, for plaintiff.

Mr. W. A. Gray, for defendant.

Opinion by Davis, J., January 5, 1906.

This was a bill in equity, filed to recover the sum of \$16, being the amount of sick benefits for four weeks from August 30, 1904, to September 27, 1904. The defence, as set forth in the answer, is that the plaintiff was in arrears for dues, and that such arrearages were not finally paid until September 2, 1904, and that under the by-laws the plaintiff was not entitled to sick benefits until four weeks had elapsed from the said September 2.

The section of the by-laws governing the question is as follows:

Article IV. Sec. 2. A member who is more than thirteen weeks in arrears for dues shall be debarred from all sick and funeral benefits, voting or speaking on matters before the Lodge, for the space of four weeks after all arrearages have been paid; said suspension to be announced by the Commander.

This by-law is a term in the contract of membership, is reasonable and valid. The fact that the plaintiff paid her arrearages up to September 2, 1904, did not give her a right to receive sick benefits until the further probationary period of four weeks should have expired.

In *Alters vs. Protective Association*, 43 W. N. C. 336, the court held that a by-law providing that after the payment of arrears a probationary period of six months shall elapse during which no benefits shall be paid to the delinquent member or his heirs, is not an unreasonable regulation, and is valid; and in *Beneficial Society vs. McVey*, 92 Pa. 510, it was held that a member of an unincorporated beneficial society does not stand in the relation of a creditor to the society, and can claim only such benefits as are prescribed by the by-laws existing at the time he applies for relief.

This case is similar in very many respects to that of *Simms vs. Mutual Aid Society*, 15 Pa. C. C. Reps. 642, in which the court, after holding that the acceptance of back dues constituted the waiver of a by-law which would have forfeited the plaintiff's rights entirely, also held that a by-law which provides that a probationary period should elapse before the plaintiff was entitled to benefits was valid and must be enforced.

The meaning of the by-law in question is free from doubt, and no reason appears in the evidence for refusing to enforce it. Its purpose is clear and lawful, and in the absence of a waiver its terms must govern.

The exceptions are therefore sustained and the bill dismissed.

Power to require the registering and numbering of automobiles is held, in *People vs. Schneider* (Mich.) 69 L. R. A. 345, to be conferred upon a city council by charter authority to control, prescribe, and regulate the manner in which the streets shall be used and enjoyed.

*In the Court of Common Pleas No. 3, of Allegheny County, No. 995,
August Term, 1904.*

**RULE FOR JUDGMENT FOR WANT OF SUFFICIENT AFFI-
DAVIT OF DEFENCE.**

Highland Brewing Company vs. Becker.

Money in the hands of the sheriff realized upon an execution adverse to the debtor, not required to satisfy such execution, is subject to levy.

A subscription for stock of a brewery company by a saloon-keeper is not void by reason of the Act of May 13, 1887, par. 5, P. L. 108, under which he applied for his license, which provides that an applicant for a license must state in his petition that he is not "in any manner peculiarly interested in the profits of the business conducted in any other place in said county where any of said liquors are sold or kept for sale."

Mr. S. S. Robertson, for plaintiff.

Mr. W. J. Brennan, for defendant.

Opinion by Kennedy, P. J., September 24, 1904.

The affidavit of defence in this case admits the execution of the contract, which is in writing, on which the action is based, the contract being a subscription to the capital stock of the plaintiff company. The original affidavit sets up for defence that the president of plaintiff company informed the defendant that his subscription would not interfere with his (defendant's) license as a retail liquor dealer in the City of Pittsburg, and that he (defendant) could transfer the stock subscribed for to his wife. And being so informed, defendant stated to the president of plaintiff company that he would submit to his attorney the questions whether he could transfer the stock to his wife and whether the subscription would interfere with his license, and if his attorney's decision was favorable, he, the defendant, would regard the "subscription as being all right; otherwise, not." That, upon submitting the questions to his attorney, his decision on both were adverse, his defence, therefore, being that he subscribed for the capital stock upon the condition that his subscription would not interfere with his holding a retail liquor license, and that it would not interfere with his wife's holding the same, the subscription price being paid by himself.

It was admitted, on the argument, that the defendant was, at the time of making the subscription, the holder of a retail liquor license, and there was attached to his affidavit of defence an affidavit made by

him January 29, 1904, before the making of the subscription, filed at No. 487, March Sessions, 1904, with his application for a renewal of license, stating therein that he was not the owner of any brewery stock and would not hold any stock during the period for which the license asked for was granted.

The defence was considered insufficient by the court, for the reason that the condition which the defendant alleges attached to his written contract was omitted therefrom, and the defendant does not allege that it was so omitted by fraud, accident or mistake; and for the further reason that if the defendant's license should be interfered with by the subscription, it would so be from an illegal and improper act of his own, which might affect his right to retain a license, but could not affect the validity of the contract, arising, as it does here, in a collateral proceeding. It seems, too, that the condition alleged, even if accepted as agreed to by the president of the plaintiff company, would not be within the scope of his authority. It will be observed that the affidavit does not allege that the adverse opinion of defendant's counsel was ever communicated to plaintiff. Upon argument, the rule was made absolute.

Subsequently, a reargument was ordered, upon the suggestion that the subscription contract was in itself illegal and could not be enforced, the defendant, in his application for a reargument, stating "That the subscription agreement made by Otto Becker with The Highland Brewing Company was void, because the said Otto Becker was the holder of a retail liquor license, granted by the Court of Quarter Sessions of the County of Allegheny, at the time of the signing of said subscription agreement, and as a holder of such license it was not lawful for him to be the owner and interested as a stockholder in the said Highland Brewing Company, and that the plaintiff company and its agent knew that to be the fact and against public policy."

The act relied upon by defendant is that of May 13, 1887, P. L. 108, commonly known as the Brook's Law, which prescribes the qualifications of applicants for retail liquor licenses, and stipulates the contents of the petition of the applicant, providing, amongst other things, that it shall state that he is not "in any manner pecuniarily interested in the profits of the business conducted at any other place in said county where any of said liquors are sold or kept for sale."

It is contended on behalf of defendant that, under this provision of the act, the making of the subscription agreement sued on in this case was prohibited by implication, and therefore illegal and void. We cannot adopt this view. This law does not prohibit the making of the contract. It merely states one of the qualifications of an applicant for a retail liquor license, viz., "that he must not be interested in the same business conducted at any other place in the same county." The effect may be to deprive the defendant of the license he holds, or to prevent his obtaining the new license for which he has made application, on the ground of bad faith with the court, but that bad faith can in no way affect the plaintiff, who is the other party to this contract. If the making of the contract is prohibited, it must be forbidden either because of something bad in itself, which is not claimed in this case, or it must be for something forbidden bearing directly upon the contract and not arising collaterally, as in this case. This subscription agreement is binding between the parties thereto, regardless of the effect upon matters outside of it.

The order heretofore entered, making this rule absolute, must stand as made. It is so ordered.

The proximate cause of the runaway of a team harnessed to a wagon loaded with about a ton's weight, which a farmer had left standing in the street hitched to a hitching rail in front of a store while he was engaged in unloading his wagon, which became frightened because a boy, in turning over the hitching rail, struck the nose of one of them with his foot, causing them to break the halter and run away, is held, in *Stephenson vs. Corder* (Kan.) 69 L. R. A. 246, to be the striking of the horse by the boy.

Negligence of a locomotive engineer, which results in a collision, is held, in *St. Louis & S. F. R. Co. vs. McFall* (Ark.) 69 L. R. A. 217, not to be imputable to the conductor in charge of his train, so as to prevent a recovery for injuries thereby caused to the latter, where the conductor could not have controlled the action of the engineer at the time of the accident, or have prevented its occurrence.

In the Court of Common Pleas of Delaware County, No. 110, December Term, 1904.

**RULE FOR JUDGMENT FOR WANT OF A SUFFICIENT
AFFIDAVIT OF DEFENCE.**

Tryon vs. Sapovits.

A. held B.'s note. B., in payment, sent check for part of it and a new note for balance, and requested the return of the old note. A kept the check, returned the new note and brought suit on the old one. Held, on rule for judgment for want of sufficient affidavit, that the action could not be maintained.

Mr. A. J. Williams, for rule.

Mr. J. E. McDonough, contra.

Opinion by Johnson, P. J., April 21, 1905.

The plaintiff held defendant's note for \$257.85, due on November 8, 1904. On November 5, 1904, defendant forwarded to plaintiff his check for \$57.85 and a note for \$200 and \$1 for discount.

Accompanying the check and note was the following letter: "November 5, 1904. E. K. Tryon, Jr., & Co., Gentlemen: In payment of my note due November 8, 1904, I send you check for \$57.85 and note for balance, \$200, and \$1 discount for month. Kindly return this old note to me. Yours, Louis Sapovits."

The plaintiff kept the check and returned the note, then brought suit on the original note for \$200 and interest.

I do not think the plaintiff is entitled to judgment. The check and note were sent to plaintiffs *in payment* of the note for \$257.85. If they did not intend to so accept them they should have returned them. The appropriation of the check was an acceptance of the condition of the letter, *i. e.*, the payment of the note of \$257.85 by a check of \$57.85 and a note of \$200.

I cannot believe that the plaintiffs had the right to accept part of the offer of payment and repudiate the rest. The plaintiffs' counsel earnestly contend that they have the legal right to do it. It may be so, but some other court will have to say so.

Failure to look and listen before crossing a street car track at a public crossing is held, in *Marden vs. Portsmouth, K. & Y. Street Railway (Me.)* 69 L. R. A. 300, not to be negligence *per se* as matter of law.

In the Court of Quarter Sessions of Luzerne County, No. 292, June Sessions, 1900.

**RULE TO SHOW CAUSE WHY AN EXECUTION OF FI. FA.
SHALL NOT ISSUE.**

Commonwealth vs. Gabriel.

Under section 20 of the Act of June 16, 1836, P. L. 784, which provides that "each of said courts shall have power to award process, to levy and recover such fines, forfeitures and disbursements as shall be imposed, taxed or adjudged by them respectively," an execution of *fi. fa.* may be issued out of the Court of Quarter Sessions to enforce payment of an order for the support of his wife by a husband who has been guilty of desertion.

Mr. Rush Trescott, for rule.

Mr. William J. Goeckel, contra.

Opinion by Halsey, J., Nov. 17, 1904.

This proceeding is in the Court of Quarter Sessions. The defendant, on June 23, 1900, was found guilty of desertion and was sentenced to pay \$25 a month to his wife. On the same day he entered into security to comply with the sentence of the court, with Peter Helfrich as surety. On May 5, 1903, Peter Helfrich surrendered the defendant, and he was committed to the Luzerne County prison. The property of the defendant was seized in execution by the sheriff, and was sold to satisfy the demands of the execution, leaving a balance over and above the amount of the debt named in the hands of the sheriff.

On November 24, 1902, the court directed that the sum of \$500, out of the fund realized by the sheriff's sale, should be impounded and held as security for the compliance by the defendant with the decree of the court on June 23, 1900, and thereupon the defendant was discharged. That on May 5, 1903, the said sum of \$500 in the hands of the sheriff was directed to be deposited by him in the Wyoming Valley Trust Company of the City of Wilkes-Barre, to remain there until the further order of the court, to meet the demands of the order of November 24 1902.

The said defendant, William Gabriel, has not complied with the sentence of the court of June 23, 1900. That under the terms of the said sentence, there is due to the prosecutrix the sum of \$115. The rule was granted in this case to give relief to the prosecutrix in enforce-

ing payment of the amount due by the said defendant in pursuance of the sentence of June 23, 1900.

Can an execution of *fi. fa.* be issued out of the Court of Quarter Sessions upon this decree? By the Act of June 16, 1836, Sec. 20, P. L. 784, it seems that it can.

The next question that arises in pursuance of this writ directed to the sheriff is, can he levy upon the money impounded as aforesaid? This money is in the hands of the sheriff, realized by him upon an execution, and was collected out of the defendant's property. It is adverse to the defendant. Being adverse to the defendant, it seems that the case of Herron's Appeal, 29 Pa. 240, would permit a collection of this money upon a *fi. fa.* execution out of the fund now in the hands of the sheriff. It is said in that case that money realized on an execution adverse to the debtor, and not in his personal possession, is liable to be taken in execution. However, there is no question that, under the Ac. of June 16, 1836, Sec. 20, P. L. 784, that the Courts of Quarter Sessions have power to award process, to levy and recover such fines, forfeitures and amercements as shall be imposed, taxed or adjusted by them respectively.

Rule absolute.

A creditor of a religious corporation is held, in *Allen vs. North Des Moines M. E. Church* (Iowa) 69 L. R. A. 255, to have no right of action against the individual members of it as such. The question of liability of member of religious society for its debts is the subject of a note to this case.

In an action against the maker and indorser of a promissory note, joined in the same suit, it is held, in *Wilson vs. Exchange Bank* (Ga.) 69 L. R. A. 97, that the indorser may set off an individual claim against plaintiff growing out of the transaction which gave rise to the execution of the note.

The liability of a master to a servant for injuries caused by negligence of a foreman in directing work is denied in *Dill vs. Marmon* (Ind.) 69 L. R. A. 163, where the master has otherwise performed his duty.

In the Orphans' Court of Chester County.

PETITION FOR PROCEEDINGS IN PARTITION AND ANSWER THERETO DENYING TITLE IN PETITIONERS.

Painter's Estate.

Testator provided as follows: "After my executor hereinafter named shall have paid the legacies as above mentioned, and all my just debts and funeral expenses, the balance of my property, real, personal and mixed of whatever kind and wherever found, I give to my beloved wife, H. E. P. In case my real estate is not sold at the time of my death, then I give my executor hereinafter named the right or power to sell the same at either public or private sale, and the money arising from the sale of my property is for the use of my wife before mentioned during her natural life, and at her death one-half of the property that may be remaining is to be given to my mother and two sisters, or the survivor or survivors of them, or their heirs and assigns—the other half is to be at the disposal of my wife, she to dispose if she see proper."

The widow died without exercising the power of sale, leaving a will devising all the real estate. Held: That the right of testator's mother and sisters to take was not conditioned upon the land being sold during the life of the widow, and that therefore the widow's devisee was entitled to the undivided, one-half of the real estate only.

Messrs. Wm. M. Hayes and J. C. Hayes, for petitioners.

Mr. J. F. E. Hause, for widow's devisee.

Opinion by Butler, J., Sept. 18, 1905.

Isaac Painter died, testate, seized of certain real estate, and leaving to survive him a widow and two sisters. The provisions of his will, disposing of his real estate, are as follows: "After my executor hereinafter named shall have paid the legacies as above mentioned, and all my just debts and funeral expenses, the balance of my property, real, personal and mixed of whatever kind and wherever found, I give to my beloved wife, Helena Eliza Painter. In case my real estate is not sold at the time of my death, then I give my executor hereinafter named the right or power to sell the same at either public or private sale, and the money arising from the sale of my property is for the use of my wife before mentioned during her natural life, and at her death one-half of the property that may be remaining is to be given to my mother and two sisters, or the survivor or survivors of them, or their heirs or assigns—the other half is to be at the disposal of my wife, she to dispose if she see proper."

The widow has died without exercising the power of sale over the real estate, and has attempted to devise it to her sister, Catharine Ellen

Weigel. The sisters of Isaac Painter, claiming to have a half interest in the real estate, have filed their petition for partition, to which the widow's devisee has filed an answer denying title in them.

It is contended on behalf of the respondent that even if the second sentence of the devise in Isaac Painter's will qualifies the first, still the petitioners have no interest in the real estate, because the widow did not exercise her power of sale; that the petitioners' interest was contingent upon a sale by the widow. We entertain the view that if this second sentence is operative, the petitioners are vested with the interest they claim in the real estate. This sentence we think manifests a purpose to give the widow a life interest in the real estate, with power to dispose by will of one-half of it, and to give the other half of the fee to the petitioners. The testator contemplated that it would probably be convenient for his widow to have the real estate reduced to money, and therefore gave her the requisite power; and, assuming that she would exercise it, provided at her death for a disposition of the proceeds, instead of the real estate itself. This disposition imperatively gives one-half of the proceeds to the petitioners, and as imperatively, we think, no sale having been had, invests them with title to one-half of the real estate. It was not intended that the petitioners who are unconditionally given one-half the proceeds of a sale of the real estate should be robbed of all interest in the real estate should the widow elect not to sell. The testator did not mean that the widow might have the real estate in fee if she wished it, but that if she did not so wish, she might sell it and take but a trifling interest in the proceeds. This would not constitute a rational option, but would be an absurdity. Manifestly, she would not rob herself of the fee by making an optional sale for the advantage of others. As before stated, if the second sentence of the devise qualifies the first, we are satisfied that the petitioners have a one-half interest in the real estate.

The first sentence, giving his real estate to his wife, standing alone, would, no doubt, vest in her a fee simple title, but we think that the sentence we have discussed above, following immediately, explains and qualifies the gift reducing it according to testator's clearly if somewhat awkwardly expressed intent. That what would otherwise be an estate in fee simple may be reduced by other language of the testator, clearly showing a purpose to convey a less estate, is abundantly decided:

Kreb's Estate, 184 Pa. 222; Shalters vs. Ladd, 141 Pa. 349; Martin vs. Heckman, 25 Pa. Superior Ct. 451; Zimmerman vs. Anders, 6 W. & S. 218.

We are of the opinion that the petitioners possess the interest they assert in the real estate involved, and that their petition must be allowed.

In the Orphans' Court of Lackawanna County, No. 110, 1905.

APPEAL FROM REGISTER.

In Re. Estate of Mary Ann Cawley, Deceased.

Testamentary capacity for the valid execution of a will is the knowing and comprehending the transaction; or in the popular phrase, that the decedent should, at the time of executing the will, know and understand what she is about.

The question being the condition of the decedent's mind on the day the will was written, under all the authorities, the evidence of its condition at a time near the date would be evidence as to its condition at that time.

Proof of testamentary capacity should be made by "evidence of the most unexceptional kind and character bearing on every act of disposition and confined to the time of execution."—Harden vs. Hayes, 9 Pa., 151.

The age of the attesting witness is only to be considered with reference to the requisite degree of intelligence necessary to competence in the witness. As regards children, no arbitrary and conclusive standard of years can be established, as the degree of understanding, which is the test of competency, is not developed at the same age.

The testimony of the subscribing witnesses to a will is, of course, entitled to great respect. In the absence of countervailing proof, it is decisive, but the court should not hinge the cause upon the testimony of subscribing witnesses, if there are other material facts and circumstances, and opinions of other witnesses in evidence, bearing upon the question of the decedent's capacity.

Evidence in this case held to be sufficient to sustain the appeal.

Mr. M. J. Martin for proponent.

Mr. H. A. Knapp, for contestants.

Opinion by Sando, P. J., October 20, 1905.

This is an appeal from the decision of the register admitting a paper dated September 7th, 1904, to probate on March 21st, 1905, purporting to be the last will and testament of Mary Ann Cawley, deceased.

Mary Ann Cawley died at the Hillside Home, in the County of Lackawanna on March 19, 1905, leaving to survive her no father nor mother, no husband nor children, but five brothers and three sisters, and no issue of deceased brothers or sisters.

By the paper probated, all of the decedent's estate, with the exception of a gold watch bequeathed to Annie Livsey, a niece, is given absolutely to a sister, Bridget Livsey, and Thomas J. Gildea, who drew the will, is appointed executor.

As the paper before us is contested on the ground of want of capacity in the decedent to make a will, we may as well refer to some of the authorities on this point, which show the opinions of courts and writers in similar cases, and which are regarded as tests in such cases since their announcement.

On the subject of testamentary capacity, Redfield on Wills, 124, says: "The result of the best considered cases upon the subject, seems to put the question of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction; or in the popular phrase, that the testator should, at the time of executing the will, know and understand what he is about."

"To understand in detail," say the Court in *McMasters vs. Blair*, 5 Casey, 298, "all that he is about, is quite sufficient." "A sound and disposing mind and memory," say the Court, in *Daniel vs. Daniel*, 3 Wright, 191, "is one in which the testator is shown to have had at the making and executing his will, a full and intelligent consciousness of the nature and effect of the act he was engaged in; a knowledge of the property he possessed; an understanding of the disposition he wished to make of it by the will, and of the persons he desires to be his beneficiaries."

These citations, to which many more might be added, contain in a generalized form a rational rule on the subject of testamentary capacity.

We have limited the investigation in the present case to all that related to the sanity or mental capacity of the decedent at or before the time when the alleged will was made, and within a short period thereafter.

The question at issue being the condition of the decedent's mind on the day the will was written, under all the authorities, the evidence of its condition at a time near the date would be evidence as to its condition at that time.

Proof of testamentary capacity should be made by "evidence of the most unexceptional kind and character bearing on every act of dis-

position and confined to the time of execution:" *Harden vs. Hayes*, 9 Pa., 151.

It is contended that the decedent was of unsound mind at the execution of the will, from her condition before and after that time. This point is predicated on the fact, that before and after the 7th day of September, there was unsoundness and derangement in the mind of the decedent. That she was deranged after that date, is proved by the most irresistible evidence; but whether before, is most strenuously denied. It is conceded by all parties, that on September 12, the day she was removed to the Hillside Home, that she was entirely deranged. The contestants rely upon the testimony of Dr. O'Malley and his wife, two disinterested witnesses to support the allegation of unsoundness of mind, prior to and on the day of the execution of the will.

It is well known, that man insane may be well today, insane tomorrow, better the next day, and hopelessly diseased the third. Although it should be proved, that at a prior or subsequent day, a man was incapable of making a will, it will not follow that he was so when the will was executed. The converse of this proposition is equally true; for when a man is mentally unsound, it does not follow he has a lucid interval from proof that he was sane before and after a certain period.

Mr. Justice Rogers says: "The courts must demand the most decisive proof of the complete absence of influence and excitement at the preparation and making of this asserted will; it must require unimpeachable evidence of unbiased volition and of clear capacity. It must in fact, expect to be shown instructions coming from the decedent himself, and an execution in the presence of witnesses above all suspicion."

The decedent is shown by Dr. O'Malley and his wife, both entirely disinterested witnesses, to have been of unsound mind when she was taken to Archbald by Mrs. O'Malley, which they positively fix as the 7th day of September, 1904, the very day on which the will purports to be made. She is shown by the testimony of Dr. Van Doren, another disinterested witness to have been of unsound mind on the 10th, 11th and 12th days of September, 1904, when he examined her, and joined in the certificate by which she was consigned to the insane department of the Hillside Home.

According to the testimony of Dr. O'Malley and his wife, the

decendent went to their house in the capacity of a domestic on July 22, 1904; while there she had insane delusions in regard to the subject of marriage and that she was about to be married; that on Monday, September 5th, she went to Archbald, and during the night after her return, she asked Dr. O'Malley to protect her, she thought she was going crazy. On Tuesday night she got out of bed and went to Green Ridge, and came back about 6 o'clock on the morning of Wednesday, September 7th, and on the same day she was taken on the 10:13 o'clock train to Archbald by Mrs. O'Malley, to the home of her sister, Mrs. Bridget Livsey.

It is evident that Mrs. Livsey, the chief beneficiary in the will, knew of the delusion on the subject of marriage, for it appears in the testimony of Mrs. Livsey herself, who says that about a week before Mrs. O'Malley brought her sister home, while her sister was visiting her, she threw rice and an old shoe after her when she went away.

The subscribing witnesses were the two daughters of Mrs. Livsey, one aged thirteen years, the other fourteen years.

It is said by Mr. Greenleaf in his work on Evidence, Vol. 2, Sec. 691, that "the attesting witnesses are regarded in the law as persons placed round the testator, in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity."

The age of the attesting witness is only to be considered with reference to the requisite degree of intelligence necessary to competence in the witness. As regards children no arbitrary and conclusive standard of years can be established, as the degree of understanding, which is the test of competency, is not developed in all at the same age.

The testimony of the subscribing witnesses to a will is, of course, entitled to great respect. In the absence of countervailing proof, it is decisive, but the Court should not hinge the cause upon the testimony of subscribing witnesses, if there are other material facts and circumstances, and opinions of other witnesses in evidence, bearing upon the question of the testator's capacity.

A careful consideration of all the evidence leads to the conclusion that the appeal must be sustained and the probate vacated.

And now, to wit, October 20, 1905, this cause came on to be heard upon petition and appeal from probate of alleged will of decendent and answer thereto and testimony taken; and upon consideration thereof,

it is ordered, adjudged and decreed that the appeal be sustained, and the probate of said alleged will and the letters testamentary issued thereon are set aside and vacated.

*In the Court of Common Pleas of Luzerne County, No. 26, January
Term, 1905.*

RULE TO OPEN JUDGMENT.

Edwards vs. Welsh Baptist Church.

Where the trustees of a church give a judgment note to a person to whom they owe nothing under a mistake of fact and law, the judgment entered upon the note will be opened.

Messrs. C. B. Lenahan and Arthur H. James, for plaintiff.

Mr. B. R. Jones, for defendant.

Opinion by Ferris, J., September 8, 1905.

The judgment in this case was entered upon a sealed promissory note with confession of judgment, purporting to have been executed by the president and secretary of the board of trustees of the First Welsh Baptist Church of Plymouth.

So far as the depositions show, there is no dispute as to the material facts, which appear to be as follows:

1. The church was indebted to Mrs. Rachel Williams in her lifetime in the sum of \$250 for money loaned; which debt was evidenced by a promissory note given by the trustees of the church to her.

2. Mrs. Williams died intestate Feb. 13, 1902, leaving surviving a daughter, Elizabeth, wife of James Edwards, the plaintiff in this judgment, and several other children.

3. After Mrs. Williams' death, the daughter, Mrs. Edwards, surrendered to the trustees their original note to her mother and took from them a new note to herself representing the same indebtedness.

4. Afterwards, on Feb. 6, 1903, she also died, intestate, leaving surviving, her husband and several children; and no letters of administration on her estate have been issued.

5. After her death, her surviving husband, the present plaintiff, surrendered to the trustees of the church the note given to Mrs. Ed-

wards, and took in his own name the note on which this judgment was entered, which also represented the same indebtedness as the original note to Mrs. Williams and the second one to Mrs. Edwards.

6. There appears to have been no new or other consideration than the original loan by Mrs. Williams for either of the two notes subsequent and successively given to Mrs. Edwards and her husband, unless from the evidence there could be implied an agreement by each of them respectively to indemnify and save the church harmless from any claim, suit or demand by others for the money represented by the new notes.

7. It seems that an administrator has been appointed on the estate of Rachel Williams, deceased, who now claims and threatens to sue the church for this money.

8. All parties seem to have acted on the belief that at Mrs. Williams' death the money was owing to Mrs. Edwards, and, at the latter's death, to her husband, and that the daughter and, later, the husband was in fact and law the creditor of the church as to this fund, and in that capacity the note to each was given and received. It does not appear that either of them, in dealing with the trustees made any claim that there had been a legal transfer of Mrs. Williams' claim to Mrs. Edwards, nor is there any evidence that such a transfer had been in fact made or attempted to be made, except the statement in the plaintiff's testimony that Mrs. Williams, by a verbal direction (not claimed to have been reduced to writing) had disposed of her property among her children, and had given this money to her daughter Elizabeth. Whether this testimony, vague and uncertain as it is, is sufficient to raise the question (a) whether there was a gift of the church note by mother to daughter, either inter vivos or causa mortis or (b) if not, whether there was a family understanding or agreement to divide the mother's property among the children without administration, pursuant to which the church note was to go to Mrs. Edwards, need not be now be determined, since, assuming her title to it to be good so as to warrant the substitution of a note to herself, the fact still remains that she died intestate leaving a surviving husband and children, and there is absolutely no evidence of a gift or assignment by Mrs. Edwards to her husband of the claim against the church, nor of any act by which the children's interest therein became vested in him. We are thus left to draw the only conclusion warranted by the evidence concerning the note

on which this judgment is founded, viz. : that it was given by the trustees to the plaintiff under a misapprehension and mistake, either mutual as between them and him or existing as to them, with knowledge of and failure to reveal the truth by him as to the relation in which he stood to the church with respect to this debt.

It is, of course, not to be presumed without evidence that he acted fraudulently either by making false representations or withholding true ones in order to induce the trustees to execute this note in his favor, and the evidence of what actually took place, is too meager to warrant such a conclusion. He apparently considered himself and was deemed by the trustees to be the sole creditor to whom this money was owing, and that no other person stood to the church in that relation. From the evidence it would seem that this was a mistake of fact superinduced by a mistake of law, and that to enforce this contract without affording these defendants the opportunity to call upon the plaintiff and the administrator of Mrs. Williams or other interested parties, if any, to interplead or otherwise determine to whom this money rightfully belongs, would be inequitable, and might entail great hardship upon these trustees. There is good authority for holding that in Pennsylvania such a case is an exception to the general rule that ignorance of the law is no defence, and is one in which equity may afford relief. *Heacock vs. Fly*, 14 Pa. 450; *Gross vs. Laber*, 47 Pa. 520; *Whelen's Ap.*, 70 Pa. 410; *Russell's Ap.*, 75 Pa. 269, 290; *Coettel vs. Sage*, 117 Pa. 298; *Wilson vs. Ott*, 173 Pa. 253; *Norris vs. Crowe*, 206 Pa. 438, 448, 449. In *Gross vs. Laber* *supra*, Mr. Justice Agnew said, (p. 526) : "Now, from the evidence offered, it plainly appears that the defendants gave their bond for a debt, which their intestate did not owe, and was not authorized to pay; and they were not trustees in law or in fact; and were not authorized to pay Ann Albright's debt, and did not owe the debt themselves, and they aver that in giving the bond, they did so in mistake of their rights. This, therefore, is plainly the point raised by their offer, and the question is, whether equity will relieve against such a mistake. Clearly it will. It is not a voluntary bond, or a bond given for the benefit of another intending it so to be, but one given in a double mistake of the duty to pay and the authority to undertake as trustees. The mistake was not one of mere law, but of fact as well as law. It is precisely the kind of case referred to by Story in his Equity Jurisprudence,

Vol. 1, Secs. 120, 130, which he says, 'seems to involve in some measure a mistake of fact arising from a mistake of law,' and makes it an exception to the undeniable rule that equity cannot relieve in cases of mere ignorance or mistake of law. That rule is well-settled law of this state (citing cases). But in the cases in which the doctrine prevails that ignorance of the law will not avail as a defence, it has been where the party has acted upon some misconception of legal effect which he supposed would follow, or some legal right which he supposed he had or had not. In each case he intended to act in his own personal and individual capacity, and the mistake was only collateral to the direct act. But here the parties acted in the capacity of trustees. * * * No duty lay on John Gross to pay Ann Albright's debt, and none lay on them as his administrators. They were not trustees in fact and were not in law. They wholly misconceived the attitude in which they were placed. It was a mistake of the facts of their position, arising it is true out of a misconception of their legal relation * * * (p. 527). In 1 Parsons on Contracts, 363, it is said, 'the assumption of a supposed liability or danger which has no foundation in law or fact, is not a valuable or sufficient consideration; where one through mistake of law acknowledges himself under an obligation which the law does not impose he is not bound by such promise.'

There can be no trust without a beneficiary. In the case at bar, there was no trust relation, so far as appears, between these defendants and James Edwards. As to him they were not trustees, and so far as appears owed him no duty of payment of the money originally borrowed from Rachel Williams. The obligation here in question, like that in Gross vs. Leber, was given because "they wholly misconceived the attitude in which they were placed. It was a mistake of the facts of their position, arising, it is true, out of a misconception of their legal relation." We do not understand that the defendants are seeking to avoid payment of this debt to the rightful creditor to whom they owe the duty of payment, but are asking to be protected from compulsory payment as trustees to one of whom it is claimed that they stand in no trust relation. We think they are entitled, before being compelled to pay this money, to have the question determined to whom it should be paid. To open the judgment is the first step in that direction, and the rule to open is, therefore, made absolute.

In the Court of Common Pleas of Dauphin County, No. 51, June Term, 1904.

RULE TO STRIKE OFF APPEAL.

Wetzel and Hambleton vs. Alleman.

The court has no power to interpose to save an appeal, which has been filed after the time allowed by law, as a mere matter of indulgence, but only when equitable ground, upon which relief is asked, has been clearly established.

Defendant filed his appeal five days after the time limited by statute. Plaintiff moved to strike it off. Defendant pleaded sickness as an excuse for his delay which plaintiff denied. Defendant offered no testimony to support his averment. Held: That the cause assigned by defendant for his delay was not established, and the appeal should be stricken off.

Mr. D. S. Seitz, for rule.

Mr. O. G. Wickersham, contra.

Opinion by Kunkel, J., October 11, 1905.

This appeal was filed too late. It was filed five days after the time limited by the statute. In answer to the rule to strike it off the defendant avers that he was prevented from filing it within the required time by serious illness which continued from the time when he received the transcript from the alderman to the time when he filed it in the prothonotary's office, a period of two months. Upon the matters thus averred the plaintiffs have joined issue. The burden of sustaining his averment, therefore, rests upon the defendant, but he has offered no testimony to support it, and we are in no way advised respecting the circumstances of his illness. As the case is presented, it shows an appeal filed after the time allowed by law, an averment by the defendant in excuse of the delay, and a denial of the averment by the plaintiffs. Upon this presentation we cannot sustain the appeal. The cause which the defendant assigns for his delay is not established, and we cannot act upon it. We have no power to interpose to save an appeal which has been filed after the time allowed by law as a mere matter of indulgence: *Schreckenkeisen et al. vs. Kishbaugh et al.*, 162 Pa. 45; *Ward vs. Letzkus*, 152 Pa. 318; but may do so only when equitable ground upon which relief is asked has been clearly established: *Newton vs. Hof-somer*, 5 Kulp, 420; 16 Cyc. 39.

The rule to strike off the appeal is made absolute.

In the Court of Common Pleas of Montgomery County, No. 154, June Term, 1904.

MOTION AND REASONS FOR A NEW TRIAL.

Turnpike Company vs. County.

In the condemnation of a turnpike road the damages should not be determined solely by the amount it would cost to put the road-bed in place. A property is not always worth what it costs to build it.

A jury should not consider the various elements of damage as items to be added but as matters to be considered in their bearing upon the value of the property as a whole. When a jury begins to itemize for the purpose of adding up the various items it is pretty sure to duplicate the actual damages.

Where a verdict is clearly against the weight of the evidence the court should not allow it to stand.

A court on hearing a motion for a new trial, judges of the action of the jury on the testimony on both sides and considers whether too much or too little weight has been given to features, for the whole of the testimony in view of its intrinsic character, and the court must say on a calm consideration of it all whether justice does or does not require a new trial.

Messrs. Louis M. Childs and Henry M. Brownback, for plaintiff.

Mr. J. P. Hale Jenkins, for defendant.

Opinion by Swartz, P. J., September 18, 1905.

On May 26, 1904, the plaintiff turnpike was condemned and freed from tolls. The jury of view valued the property taken and assessed the damages at \$3,795. From this assessment the turnpike company appealed to the court of common pleas. A trial before a jury in said court resulted in a verdict in favor of the plaintiff company for \$10,375. The roadway is about one and eight-tenths miles long.

The witnesses differed widely in their estimates of the value of the physical road-bed. The highest figures were those of Mr. Cooper, \$11,500. He, however, did not make the careful examination of the road-bed that some of the other witnesses gave to it. The civil engineer of the plaintiff fixed this value at \$8,200, and the engineer of the county at \$4,250. These values were exclusive of the culverts and the damage to the toll-house. The average annual income for the last four years, after deducting all expenses, was \$236.

The stock of the company was not on sale in the market. Only one sale was testified to. The stock then brought \$5. The par value of the stock was \$25, and three hundred and forty-five shares had been issued. No dividends were paid, but the company in the construction

of its roadway incurred a debt of \$1,240. This debt was fully paid at the time of the trial out of the net income of the company. The road-bed was in a fair condition to pay dividends in the future.

The officers of the company in their return under oath to the auditor-general valued their property at \$2,575.

Under the evidence submitted we fail to comprehend how the jury could find a verdict in damages amounting to \$10,375.

The officers of the company were perhaps the best judges of the value of their property. They knew the condition of the road-bed, the cost of its maintenance, and the receipts from tolls. When, under oath, they fixed the value at \$2,575, due weight should have been given to their judgment. We are aware that there is a temptation to undervalue property when the owner knows such value forms the basis of a tax assessment, but we cannot believe that the interest of these officers influenced their judgment to such an extent that they valued their property at one-fourth of its true worth. Again, a property is valued largely according to its earning capacity. This element should have due weight in fixing the damages, especially so when a turnpike road is the subject under consideration.

The net income of corporate property is ordinarily the best test of its value. The value of a turnpike road depends largely upon the fact whether the receipts from tolls will meet the expenses of maintenance and will leave a margin for distribution among the stockholders. It will not do to value a property of this character solely at the sum it would cost to put the road-bed in place. A property is not always worth what it costs to build it.

Where a verdict is clearly against the weight of the evidence the court cannot allow it to stand. * "A court on hearing a motion for a new trial, judges of the action of the jury on the testimony on both sides and considers whether too much or too little weight has been given to features, for the whole of the testimony in view of its intrinsic character, * * * "and the court must say, on a calm reconsideration of it all, whether justice does or does not require a new trial." Grant vs. Com., 71 Pa. 505. It appears to us, from the size of the verdict, that the jury must have taken the several elements of damage as items to be added, and not as matters to be considered in their bearing upon the

property as a whole—that is, they valued the road-bed and added to that the capitalization of the net income of the property.

It will not do to divide up a property in this way to ascertain its value. The road-bed is valuable because there is a right to collect tolls, and tolls cannot be collected without a road-bed. The property must be valued as a whole. The road-bed and franchise are dependent upon each other for their value. When a jury begins to itemize and sums up the various items, it is pretty sure to duplicate damages.

We considered with great care the various elements that constitute the plaintiff's property, and we are of opinion that the property as a whole was worth at the time it was taken the sum of \$5,500. We cannot allow the verdict to stand for a larger sum. If the plaintiffs are not willing to accept this sum a new trial will be granted. We were disposed to grant a new trial, but upon further reflection we concluded that ample justice can be done to both parties without the annoyance, delay, and expense of a new trial.

The property produced \$308 during the last year the turnpike was operated before the condemnation. This was in excess of the average annual income. At the same time the evidence shows that the net income was increasing from year to year rather than decreasing. A property that would cost from \$5,000, to \$8,000, and produces a net income from \$250 to \$300, is fairly worth \$5,500. A higher estimate of the damages, would, in our judgment, be excessive to the county.

And now, September 18, 1905, if the plaintiff will, within fifteen days, file a disclaimer and remit all of the verdict over and above \$5,500, a new trial will be refused, otherwise a new trial will be awarded as prayed for.

A niece of a former wife of a man is held, in *Smith vs. Supreme Tent K. of M. (Iowa)* 69 L. R. A. 174, not to be a relative of his child by a subsequent one, within the meaning of a statute permitting certificates of mutual benefit societies to be taken in favor of relatives.

A provision of a life insurance policy that suit shall be brought on it within a period less than that fixed by the statute of limitations is held, in *Union Central L. Ins. Co. vs. Spinks (Ky.)* 69 L. R. A. 264, to be void as against public policy.

In the Court of Quarter Sessions of Monroe County, No. 15, December Term, 1905.

**RULE TO SHOW CAUSE WHY APPEAL FROM JUDGMENT
OF THE JUSTICE OF THE PEACE SHOULD
NOT BE QUASHED.**

Luckey's Appeal.

The act of April 22, 1905, P. L. 285, allowing an appeal by defendant in cases of summary conviction, from conviction by a magistrate, as a matter of right, does not offend against Art. 5, Sec. 14, of the Constitution.

Article 5, Sec. 14, of the Constitution, simply presents the right of appeal in summary conviction and cases of penalties and does not prohibit the legislature from declaring the method of trial or appeal in such cases.

Mr. A. M. Palmer, for rule.

Mr. R. L. Burnett, contra.

Opinion by Staples, P. J., January 29, 1906.

The defendant in this case, under the act of April 22, 1905, P. L. 285, appealed from the judgment of the justice of the peace without an allocatur. The commonwealth contends, that because said appeal was not allowed by the appellate court for cause shown, it should be quashed, for the reason that the said act of April 22, 1905, offends against Art. 5, Sec. 14, of the Constitution, which provides that, "in all cases of summary conviction in this commonwealth, or of judgment in suit for a penalty before a magistrate or court not of record, either party may appeal to such court of record as may be prescribed by law, upon allowance of the appellate court or judge thereof, upon cause shown," and which provision prohibits the legislature from providing for an appeal as a matter of right, claiming that no appeal may be taken in case of summary conviction unless by allocatur as above stated.

We are unable to agree with this contention. The provision in the constitution for an appeal in cases of summary conviction as above stated, had for its purpose the protection of the right under and subject to special regulations, and cannot in any sense be considered a restriction or prohibition on the legislature from enlarging such right or providing for a different method of trial.

Previous to the adoption of the constitution of 1874 there was no right of appeal from a summary conviction. After the adoption of said constitution, the legislature, by act 17 April, 1876, P. L. 29, pro-

viding for carrying into effect this provision of the constitution, stipulating, or making as one of the requisites of an appeal, the allowance by the proper court, for cause shown. On April 22, 1905, P. L. 284, the legislature gave to the defendant, summarily convicted before a magistrate or court not of record, the right of appeal without an allocatur, "upon entering into good and sufficient recognizance, with one or more sureties, to answer said complaint on a charge of misdemeanor before said court, leaving the provision with reference to appeal of a suit for penalty the same as provided for in the act of 1876. In the absence of any provision in the constitution restricting the right of the legislature, it had the power to grant the right of appeal in all cases of summary conviction and provide the manner in which such appeal could be taken, the same as it had the power to grant the right of appeal, in all criminal cases without special allocatur. In fact the constitutional provision cited, was not necessary to vest the power in the legislature to provide for appeals in such cases, but simply secured or preserved to the parties, the right of appeal when the legislature neglected to give it. The legislature does not need constitutional authority to provide for the taking of writs of error or appeals nor to provide for the method of the same, nor is such legislation unconstitutional.

"It is a well settled rule that legislation that affects the remedy merely, and does not deny the right, is not open to objections upon constitutional grounds." *Stoddard vs. Smith*, 5 Binney, 355. *Biddle vs. Starr*, 9 Pa. 461. *Keene's Appeal*, 64 Pa. 268.

"It can no more be contended that Art. 5, Sec. 14, restricts the power of the legislature to provide some other method in the taking of an appeal, than that Art. 5, Sec. 3 of the Constitution, which gave the Supreme Court appellate jurisdiction in all cases, prohibited the legislature from establishing the Superior Court, and giving to it appellate jurisdiction in certain cases; nor that Art. 5, Sec. 24, prohibited the legislature from giving the Superior Court original appellate jurisdiction in criminal cases other than felonious homicide, although said Sec. 24, provides for the removal of all such cases to the Supreme Court for review.

The maxim "*expressio unius exclusio alterius*" has no application to the question at issue.

It would seem incongruous to say that the legislature which by an act of assembly, declared a certain act or acts to be an offense or offenses against the laws, and punishable, could not provide the method of procedure relative to a fair trial and consideration of the same. If the legislature has the right to declare that the maintenance of a fish basket, without certain appliances or openings, is a violation of the law and punishable by fine upon trial and conviction before a justice of the peace, why can it not further provide that upon conviction, the defendant may have the right of appeal to the court of quarter sessions of the peace of the county wherein the offense was committed? In what manner does Art. 5, Sec. 14, of the Constitution conflict with such power or authority on the part of the legislature? If the constitution had provided that "no appeal shall be taken in a case of summary conviction unless by special allowance of the appellate court" it would present a different proposition. The constitutional provision had as its intention the securing of a certain right. The act of 1905 simply provides a method of procedure and is not in conflict with the constitutional provision.

It might be urged that the view as contended for, that the constitution restricted the power of the legislature to enlarge the right of appeal was held by the Supreme Court in the case of McGuire against Shenandoah, 109 Pa. 613, wherein Judge Pershing, of the court below held, that Art. 5, Sec. 14, changed the manner in which appeals might be taken in cases of suits for penalties and was sustained by the Supreme Court, which case was afterwards followed in *Com. vs. Eichenberg*, 140 Pa. 158, and *Com. vs. McCann*, 174 Pa. 19. A careful reading, however, of the case of McGuire against Shenandoah warrants the conclusion that Judge Pershing did not hold that the legislature had no right to prescribe any other method of appeal, but simply held that all previous acts relative to appeals of cases, like to that under discussion, were abrogated or repealed by implication, by Art. 5, Sec. 14, of the Constitution and by the act of April 17, 1876, P. L. 29, Sec. 1, his own language in that respect being as follows: "The act of April 17, 1876, is substantially in the language of the constitution, and directs that where an appeal is allowed, it shall be upon such terms as to payment of costs and entering bail as the court, or judge allowing the appeal, may determine. This supplies former enactments and necessarily throws

the question of appeal upon the court to the exclusion of the magistrate."

We are unable to find anything in the cases cited or in the constitution itself, which restricts the legislature in its enactments as to the method to be followed in the trial of offenses, either classed as cases of summary conviction or as crimes and misdemeanors, except where the constitution preserves or protects the right of appeal to higher courts, and the right of trial by jury.

"The purpose of the constitution undoubtedly was to preserve the jury trial wherever the common law gave it, and in all other cases to let the legislature and the people do as their wisdom and experience might dictate. Summary convictions were well known before the formation of the constitution, and they are not expressly or impliedly prohibited by that instrument except so far as they are not to substitute for a jury where the latter mode of trial had been previously established." *Van Swarrow vs. Com.*, 24 Pa. 131.

The same principle was enunciated after the adoption of the present constitution by Chief Justice Sharswood in *Wynkoop vs. Cooch*, 89 Pa. 450, and by Chief Justice Sterret in *School District against Pitts*, 184 Pa. 156, in which he said: "Generally speaking, the legislature may provide any system of settlement or trial without coming in conflict with the provision of the constitution, if trial by jury did not exist, in such case theretofore."

And Chief Justice Paxson, in *Com. vs. Waldman*, 140 Pa. 89, clearly had in mind this right or power of the legislature, when he said: "When the legislature shall decide that in every case of a petty summary conviction, the defendant shall have the right to a jury trial, they will probably say so in language too clear to be misunderstood" and attention is called to the fact that the chief justice constituted a member of the court, and who sat, heard and took part in the decision of *Com. against Eichenberg*, 140 Pa. 158, which has been heretofore cited.

A property right in price quotations gathered by a board of trade is held, in *Board of Trade vs. L. A. Kinsey Co. (C. C. A. 7th C.)* 69 L. R. A. 59, not to be destroyed by the fact that a large percentage of the business done under its auspices consists of gambling transaction, or that the news is susceptible of bad as well as good uses.

In the Orphans' Court of Lackawanna County, No. 204, 1904.

**SUR-RULE TO SHOW CAUSE WHY ORDER CONFIRMING
SALE SHOULD NOT BE VACATED AND
SALE SET ASIDE.**

In Re. Estate of Leopold Galboesch, Deceased.

An administratrix, as to expenses of administration, should await the final settlement of her administration account, when, if a deficiency of personal assets appears, a sale may be authorized to pay the balance due the accountant.

The Act of June 8, 1893, P. L. 392, only has reference to debts of a decedent existing at the time of his death, and does not apply to debts and expenses necessarily incurred after his death, in his burial and settling his estate. Such claims are not debts of the decedent within the meaning of the act, although payable out of his estate.

Where an administratrix has paid from her funds a debt of the decedent she may obtain an order of sale to repay to her the said debt.

That the original creditor had been paid by the administratrix does not deprive the latter of her right to call for re-payment; such payment entitles her to subrogation.

Mere inadequacy of price is not sufficient ground for setting aside an Orphans' Court sale.

Where sufficient cause does not appear an order confirming a sale will not be vacated.

Mr. John R. Edwards, for petitioner.

Messrs. John P. Quinnan and P. E. Kilcullen, for administratrix.

Opinion by Sando, P. J., February 5, 1906.

The decedent, Leopold Galboesch, died intestate on June 12, 1902, leaving to survive him a widow, Elizabeth Galboesch; two sons, one the petitioner; and a daughter, since died. Letters of administration upon his estate issued on the 25th day of April, 1904, to Elizabeth Galboesch.

On the petition of the administratrix, an order was granted to sell the real estate of the deceased for the payment of debts; a schedule of which was attached to the petition.

The order of court prescribed the terms and fixed the time for the return of sale. A bond in due form was given and approved. On June 20, 1905, by leave of court the time fixed for the return of sale was changed from June 24, to August 7th, 1905. On August 7th, the administratrix made a return in the usual form that on July 25th, she had sold the real estate to Charles P. Shulk, for the price or sum of \$450, which was the highest and best price bid for the same, which return was confirmed *visi* August 7th, and confirmed absolutely September 18th.

On October 6, on filing petition, a rule was granted to show cause why the order confirming sale should not be vacated and sale set aside.

On filing petition, answer and replication a time was fixed for the taking of testimony for and against the rule.

The petitioner interposed the provisions of the Act of Assembly of June 8, 1893, P. L. 392, against the claims scheduled and averred, that there was personal property, consisting of furniture and insurance money; that the inventory filed was not a true, perfect and conscionable one; that notice of sale was defective, and that the price for which the property sold, was inadequate.

The schedule of debts contained two items, viz.: Funeral expenses, and expenses of administration and sale.

As to the item of expenses of administration, the better practice is prescribed by the Act of March 29, 1832, Sec. 31, P. L. 198, that in such a case the administratrix should await the final settlement of her administration account, when, if a deficiency of personal assets appears, a sale may be authorized to pay the balance due the accountant.

The Act of June 8, 1893, only has reference to debts of a decedent existing at the time of his death, and does not apply to debts and expenses necessarily incurred after his death, in his burial and settling his estate. Such claims are not debts of the decedent within the meaning of the Act, although payable out of his estate: *Elbert's Estate*, 3 Pa. C. C. 611.

The testimony shows that within a short time after the decedent's death the widow paid the funeral expenses from her own funds. The effect of the payment of the funeral expenses from the funds of the widow was to entitle her in equity to a cession of the rights of the creditor paid.

Where an administratrix has paid from her funds a debt of the decedent she may obtain an order of sale to repay to her the said debt: *Laughlin's Estate*, 23 W. N. C. 544.

That the original creditor had been paid by the administratrix does not deprive the latter of her right to call for re-payment; such payment entitles her to subrogation.

As the right of subrogation proceeds upon the broad ground of equity and benevolence, and requires neither contract nor privity to awake it to action as an equitable remedy it may be applied to every

case where one not a mere volunteer, discharges the debtor obligation for which another is, primarily, liable in person or estate. By the application of her own proper moneys in relief of the estate of her intestate, by payment of his debts Mrs. Galboesch was entitled to be substituted in place of the creditor whose claim she had discharged.

Whether there was sufficient personal estate to pay the claim is wholly immaterial in this proceeding. The claimant had the legal right to charge the real estate. The fund to be resorted to for the ultimate payment of a claim is at all times under the control of the court.

The statutes regulating the sale of a decedent's real estate, do not contemplate the exhaustion of the personal assets by the administratrix, before she is at liberty to take any action for the sale of real estate.

Practically, in this estate, it could not make any difference, as the same persons would take the personalty, if there were any, as are entitled to the proceeds of the realty, after payments of debts.

At the time of petitioning the Orphans' Court for an order to sell real estate for the payment of debts, the administratrix "must exhibit a true and perfect inventory and conscionable appraisement of all the personal estate whatever of the decedent."

The inventory filed June 20, 1904, returned as follows, viz.: "After a diligent search the two above-mentioned appraisers did not find any personal property which was of Leopold Galboesch."

An insufficient and imperfect schedule and appraisement, accompanying a petition of an administratrix to the Orphans' Court, for an order to sell real estate for the payment of debts, is amendable.

An inventory and appraisement, filed by an executor or administrator, is prima facie correct as to their amount and value, but may be rebutted by competent evidence: *Stewart's Appeal*, 110 Pa., 410.

The Orphans' Court applies the equity rule that the averments in an answer are to be accepted as verity unless overcome by the testimony of two witnesses with corroborating circumstances: *Krogman's Estate*, 34 W. N. C. 104.

The uncontradicted testimony shows that the furniture belonged to Mrs. Galboesch, and that she was the beneficiary named in the policies, on the life of the decedent, in the Mutual Life Insurance Company of Scranton and the Chicago Insurance Company.

Mere inadequacy of price is not sufficient ground for setting aside an Orphans' Court sale; but aliter, if any irregularity, misapprehension, or unfair practice be shown: Scott on Intestate Law, 619.

The respondent's answer avers that personal notice was given by letter to the heirs of the decedent, including the petitioner. This is not denied. Attached to the return of sale is a copy of the hand bill describing the premises, time and place of sale, and terms of sale; and an affidavit that at least five similar ones had been posted upon the premises and the most public places adjacent thereto.

The testimony shows that repeated efforts had been made to sell the real estate without success, before obtaining the order to sell for payment of debts.

From a careful consideration of the testimony, we are of the opinion that there was no greater value in the property than the price at which it was bid off on July 25th, 1905.

To set aside this sale, would, under the testimony, be taking from the purchaser that which in justice belongs to him.

In our opinion, sufficient cause does not appear to warrant us in vacating the order confirming, or setting aside, the sale.

Now February 5th, 1906, rule is discharged.

It was further urged that the act of 1905 was unconstitutional, because it distinguished between parties, giving to the defendant a right of appeal that was not secured to the commonwealth. We cannot accede to this. In the consideration of the proposition it is well to bear in mind that the said act distinguishes between a conviction where commonwealth is a prosecutor, and judgment in a suit for a penalty. It is not unconstitutional and never has been so held, to provide for a method of appeal for the defendant, without at the same time making a provision for the commonwealth. It is true the article of the constitution providing for appeals in all cases of summary conviction embraces both parties in its provisions; but the act of 1905, does not in any sense deny the right of the commonwealth to appeal, it simply omits to provide a method whereby the same can be done. This does not prevent the commonwealth from taking an appeal. "It would be very strange if the commonwealth might not appeal to her own tribunals for justice without the consent of certain particular officers." Com. vs. Capp, 48 Pa. 53; Com. vs. Sober, 15 Pa. Superior Ct. 520.

And as enforcing this position it will appear from careful reading relative to the recognizance, that the legislature by the act of 1905 practically gave the defendant in a case of summary conviction the right every defendant has when charged before a justice of the peace, with a misdemeanor, namely that of giving bail for appearance and trial in the court of quarter sessions of the peace. The said act reads as follows: "Upon entering into good and sufficient recognizance with one or more sureties to answer said complaint on a charge of misdemeanor before said court." The commonwealth can no more object to this right, given the defendant, than it can to the right of appeal guaranteed to him when he is charged with a misdemeanor, nor does the fact that the act prescribing the punishment, provides for one-half the fine to be paid to the informer, make any difference in the rule. The informer has no such right or interest as would permit of his objecting to the method of procedure as provided for by the legislature, on the ground that it was unconstitutional. As we view the matter, there is now, substantially, little difference in the method of procedure whereby a case may finally be brought into the court of quarter sessions of the peace, either as a misdemeanor from its inception, or a case of summary conviction, which before finally reaching the court of quarter sessions, becomes, by provisions of the legislature, a misdemeanor.

In this particular, reference is made to acts of assembly like these: Act of June 11, 1879, P. L. 154, Sec. 3, wherein it is provided, that "It shall not be lawful for any person or persons to fish with any kind of net or seines, etc., within one-quarter of a mile of the Columbia dam; * * * and any person or persons so offending shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not exceeding \$500.00, one-half to the informer." Also act of April 28, 1873, P. L. 886, Sec. 4, "It shall not be lawful to fish with nets or other method of entrapping fish, except with hook and line within half a mile of any part of any dam or a chute, * * * and any person or persons so offending shall be guilty of a misdemeanor." And similar provisions in the act of May 29, 1901, P. L. 302, and act of May 29, 1901, P. L. 355, and other acts of like tenor.

It is unnecessary to more than state that in each of these cases the defendant charged with the misdemeanor, would have the right to demand a hearing or waive the same, and in either case, the privilege of

giving his recognizance for his appearance and trial in the court of quarter sessions of the peace of the county in which the act was committed.

In comparison with these acts and the manner of procedure therein provided for, what is there unconstitutional about the method of procedure as enacted in the act of 1905, where, instead of in so many words making all cases of summary conviction, misdemeanors, it simply gives to the defendant a choice of accepting the judgment of the justice of the peace or of considering the offense charged as being a misdemeanor, and giving his recognizance for his appearance and trial in the court of quarter sessions of the peace of the county in which the alleged offense was committed.

It is immaterial as to the merits of the question, whether the legislature denominated it a misdemeanor or an appeal. The intention of the act was to give every defendant convicted in an action of summary conviction, the right of trial in the court of quarter sessions of the peace, as of course, and not simply when allowed by the appellate court. It has this power.

The action of the legislature, granting the right of appeal was wise on its part, in view of recent legislation, raising so many cases wherein persons can be arrested and summarily convicted before a magistrate or justice of the peace and be punished with severity, and without the right of trial by jury. The correctness of the Supreme Court in its position, with reference to the constitutionality of the acts providing for summary conviction and punishment thereunder, is not questioned; but when it becomes apparent that the great tendency to enlarge the jurisdiction of magistrates and justices of the peace puts the liberty of individuals in jeopardy, it must be admitted that the legislature was acting with wisdom and within its prerogatives when it enacted a law that secured the right of trial by jury in this class of cases, and in this connection, attention is called to some of the provisions in certain acts of assembly wherein summary conviction is provided for, viz: Section 9, of Act of May 29, 1901, P. L. 302 provides, that upon conviction of offense charged, defendant shall pay a fine of \$100.00 and undergo imprisonment in the county jail for three months. Sec. 26 of the same act makes the penalty a fine of \$100.00 and imprisonment for six months. Section 35 provides

for a fine of not less than \$100.00, or to be imprisoned in the county jail for three months at the discretion of the magistrate. Section 8 of the act of May 29, 1901, P. L. 335 provides for a penalty of \$100.00 and imprisonment for three months.

All of the above named offenses provide for trial before a magistrate or justice of the peace, and gives to him the power or right to sentence in case of conviction. These cases certainly do not fall within the term used by Chief Justice Paxson in *Com. vs. Waldman*, 140 Pa. 89, namely, "case of a petty summary conviction." They are infringements upon the liberty of the citizens to such an extent as ought to entitle him to right of trial by jury. The legislature cannot individuate. It may be unfortunate that in the class of cases of summary conviction, some given the right of appeal and trial in the quarter sessions are of a petty nature, and ought to be decided before a magistrate, or justice of the peace, but it would be much more unfortunate to permit the liberties of our citizens to be placed in the hands of magistrates or justices of the peace, and restricted to such an extent as would take from them the right of trial by jury.

We are unable to adopt any course of reasoning which would warrant the conclusion that it was the intention of the framers of the constitution to deprive the legislature from granting a right of appeal which would practically amount to the right of trial by jury.

And now, January 29, 1906, for the reasons above stated, the rule to show cause why the appeal in the above case should not be quashed is discharged.

The exemption from execution of the proceeds of insurance policies is held, in *Holmes vs. Marshall* (Cal.) 69 L. R. A. 67, not to be limited to claims against the insured, but to extend to those against the beneficiary, under a statute providing that all moneys, benefits, privileges, or immunities growing out of life insurance are exempt from execution.

Cash dividends upon corporate stock are held, in *Smith vs. Dana* Conn.) 69 L. R. A. 76, to belong to the life tenants, notwithstanding they were derived from the sale of permanent property in which profits had been invested.

In the Court of Common Pleas of Lackawanna County, No. 359, May Term, 1905.

**RULE TO SHOW CAUSE WHY APPEAL SHALL NOT BE
STRICKEN OFF**

George Grassa, et al., vs. George W Weiland.

Where a defendant fails to take an appeal until more than twenty days after judgment is rendered against him, unless he shows he was misled to his prejudice by something said or done either by the justice or the adverse party, and said appeal is entered *nunc pro tunc*, the Court, on a rule to strike off the same, will make the rule absolute.

Mr. George S. Horn, for plaintiff.

Mr. Charles E. Olver, for defendant.

Opinion by Newcomb, A. L. J., March 5, 1906.

This appeal was taken April 7th from a judgment rendered March 10th, being eight days after the time allowed by law had expired. During the twenty days next after the date of judgment the defendant made two ineffectual efforts to find the justice in order to take an appeal. In addition to that he tried to make an appointment with the justice by telephone, but failed because the latter was absent from his office, and his whereabouts could not be ascertained by his constable who answered the message. About that time, and within three or four days of the expiration of the twenty days, the defendant was called away from home and the time expired while he was absent from the state.

Upon these facts, but against the objection of the plaintiff, he seeks to have his appeal made good.

Just what was the form of the rule cannot now be stated with certainty. The files are missing and the continuance docket entries are indefinite and ambiguous. The case was put on the list and argued as a motion for leave to file an appeal *nunc pro tunc*, but as of what date does not appear. The proper practice would have been to file the appeal when taken. The plaintiff could have moved then to strike it off for the apparent irregularity in respect to the time when it was taken. There was no failure to file the transcript before the next return day, and that would be the irregularity to which a motion for leave to file *nunc pro tunc* is appropriate. Inasmuch as the continuance docket entries are not inconsistent with the conclusion that the transcript was filed as an appeal we shall treat the case as a rule to strike it off.

While there is a sense of vexation and hardship where repeated efforts to take an appeal have failed because on those occasions the magistrate was not found at his office, yet to sustain this appeal we would have to go farther than either the express authority or doctrine of any of the adjudicated cases warrants.

It is not alleged that the defendant was misled to his prejudice by anything said or done either by the justice or the adverse party. Other than the instances where relief is granted on those grounds the principle upon which all the cases rest is that the right of appeal and trial by jury is so far favored by the policy of the law that a party will not be suffered to be deprived of it where, without fault or laches on his own part, he has done all that he reasonably could do to get an appeal within the time prescribed by the statute. The facts upon which the defendant relies here fall short of that mark. When he found it necessary to go out of town he could have authorized some one to take the appeal for him in his absence. Had he done that, and upon proper effort the agent had failed to get the appeal, a different case would have been presented. Neglecting to do that, the defendant omitted that which he was reasonably bound to do under the circumstances, and is according to the authorities decisive against him.

The rule to strike off the appeal is made absolute.

A plea of guilty of theft, to commit which a burglary is alleged to have been committed, is held, in *Beason vs. State* (Tex. Crim. App.) 69 L. R. A. 193, not to relieve the court of the necessity of instructing the jury as to the law governing convictions on circumstantial evidence, where the fact of burglary itself depends on circumstantial evidence. An elaborate note to this case reviews all the other authorities on necessity of instruction as to law on circumstantial evidence.

An agent authorized to issue policies is held, in *Richard vs. Springfield F. & M. Ins. Co.* (La.) 69 L. R. A. 278, to bind the company by all waivers, representations, or other acts within the scope or requirements of his business, unless the insured has notice of the limitation of his power.

In the Court of Common Pleas of Luzerne County, No. 412, December Term, 1904.

MANDAMUS.

DEMURRER TO RETURN.

Bertles vs. The Laurel Run Turnpike Company.

- A petition for a writ of mandamus commanding a turnpike company to allow the petitioner, while operating and using his automobile, the right and privilege of passing over and upon its turnpike road, upon his paying the tolls established by law for the passage of vehicles of similar weight and width of tires over turnpike roads of this Commonwealth, must aver that the petitioner has complied with all the requirements of the Act of April 23, 1903, P. L. 268.
- A turnpike company has an undoubted right, in the exercise of a sound discretion, to prevent such use of its road as would make it dangerous to the general public.

Mr. O. H. Dilley, for plaintiff.

Messrs. George R. Bedford and H. A. Fuller, for defendant.

Opinion by Wheaton, J., May 8, 1905.

The alternative writ issued November 7, 1904. It was returnable November 19, 1904. To this a return was made and filed November 19, 1904, and an amended return made by agreement of counsel was filed December 13, 1904. Plaintiff filed a general demurrer on the last mentioned date.

The effort is to secure a writ of peremptory mandamus, commanding the defendant to allow the petitioner, while operating and using his automobile, the right and privilege of passing over and upon its turnpike road, upon his paying the tolls established by law for the passage of vehicles of similar weight and width of tires over turnpike roads of this Commonwealth.

The Act of April 23, 1903, P. L. 268, expressly forbids the use or operation of motor vehicles upon the public highways in the Commonwealth, unless certain requirements of the act are complied with. Among the requirements essential to the right to use or operate such vehicles on the highways, are (1) the issuance of a certificate; (2) the posting of the same in the motor vehicle; (3) the posting of the registry number upon the back of said vehicle in a conspicuous place; (4) equipment with brakes; (5) equipment with signal device, and (6) carriage of license. Violation of any of these provisions of the act is made a misdemeanor.

The petition in the case at bar fails to aver compliance by the petitioner with any of the above enumerated provisions. Alleging his specific right, it was the duty of the petitioner to aver every element requisite to establish it. The failure in this respect would, of itself, prevent the issuing of a peremptory writ. In addition to this, however, plaintiff, by his demurrer, has admitted the truth of certain allegations made by defendant in its return, which is fatal to the relief which he seeks.

He admits (1) that automobiles, by reason of their size, great speed, rivaling the velocity of railroad trains, and alarming noise, are extremely dangerous to the traveling public, and their use on public highways is fraught with great danger to travelers who drive horses; (2) that the said turnpike was designed and constructed expressly for the convenience and pleasure of people in driving with horses over the same, and by reason of its grades, high embankments and numerous curves, the passage of automobiles over the same would be such a menace as to exclude vehicles drawn by horses and give to automobiles a complete monopoly of its use; (3) that safety to the general public peremptorily demands the exclusion of automobiles from the turnpike, and for this reason passage thereof over the same is refused; (4) that no possible toll for automobiles over turnpikes would be adaptable by reason of their character.

The managers of highways, owned by private corporations, have an undoubted right, in the exercise of a sound discretion, to prevent such use of the highway as will make it dangerous to the general public. Unless forbidden by legislative enactment, as in the case of bicycles, etc., enumerated in the Act of April 23, 1889, they may exclude from its highway a carriage or vehicle, the use of which is dangerous, where the safety of the general public demands such exclusion. The legislature has not seen fit to control the exercise of this discretion as to motor vehicles or automobiles.

By the admissions of plaintiff in this case, the use of such vehicles is fraught with "extreme danger to the traveling public," and "with great danger to travelers who drive horses," and this applies particularly, for reasons stated in the return, to the highways in question. By the further admissions of plaintiff, "safety to the general public peremptorily demands the exclusion of automobiles from the turnpike,"

and this is the reason why their passage over the same has not been permitted. In view of these facts, thus established, the discretion of defendant has been lawfully and wisely exercised. In addition to this, it is conceded by plaintiff that he has no right to go upon defendant's turnpike, except upon the payment of toll.

There is no rate of toll for automobiles fixed by statute, nor does any appear to have been established by rule or regulation of the turnpike company. The plaintiff admits "that no possible toll for automobiles over turnpikes would be adequate, by reason of their character." May the court compel the defendant to accept an admittedly inadequate toll? If not, how can the court comply with plaintiff's prayer and fix the amount of toll which he must pay? Without an order that plaintiff pay toll, how can the court peremptorily command that he be permitted to use the highway in the manner which he desires? The questions suggest their own answers. Upon the case as presented, the plaintiff has failed to show a right to a peremptory writ.

The demurrer is overruled, and the prayer for a peremptory writ is refused.

NOTE.—The principle of this decision is not affected by the Act of April 19, 1905, P. L. 217.

Giving a note for interest upon a larger note already barred by the statute of limitations, which does not in any way refer to the earlier note, is held, in *Kleis vs. McGrath* (Iowa) 69 L. R. A. 260, not to revive it under a statute providing that causes of action founded on contract are revived by an admission in writing, signed by the party to be charged, that the debt is unpaid, or by a like new promise to pay the same.

The publication of the picture of a person without his consent, as part of an advertisement, for the purpose of exploiting the publisher's business, is held, in *Pavesich vs. New England Life Ins. Co.* (Ga.) 69 L. R. A. 101, to be a violation of the right of privacy of the person whose picture is reproduced, and to entitle him to recover without proof of special damages.

*In the Court of Common Pleas of Luzerne County, No. 74, May Term,
1900.*

*MOTION FOR ARREST OF JUDGMENT AND FOR A NEW
TRIAL.*

Searles vs. Rhoads.

In an action against a husband and wife for necessities furnished the wife, there can be two verdicts; one against the husband, and the other in favor of the wife.

Messrs. J. R. Scouton and Q. A. Gates, for plaintiff.

Messrs. J. F. O'Neill and D. L. O'Neill, for defendant.

Opinion by Halsey, J., January 3, 1905.

This was an action instituted by the plaintiff for the maintenance and support of the defendant's wife and minor child. During all of the time that this alleged contract relation existed, the defendant resided in the State of Florida and in the Republic of Mexico.

The defendant alleges that the court erred in not instructing the jury that the claim of the plaintiff was barred by the statute of limitations. The fact is undisputed that the defendant was at no time within the State of Pennsylvania or the State of Delaware between the date of the conclusion of the alleged contract relation and the date of bringing this suit. He was, therefore, not entitled to his plea, that the claim of the plaintiff had been barred by the statute of limitations.

The action was originally brought by the plaintiff against Charles D. Rhoads for money laid out and expended by the plaintiff for necessities for the wife and child of the defendant.

On October 3, 1903, the plaintiff, Frank C. Searle, obtained a rule to show cause why the name of the defendant should not be amended by adding the name of Bertha E. Rhoads as a party defendant, this upon an allegation that the debt for which suit was brought was for necessities for the maintenance of the family of Mr. and Mrs. Charles D. Rhoads, and the same having been furnished at the instance of Mrs. Rhoads, wife of Charles D. Rhoads, and her name having been through mistake omitted as a party defendant in the case. Subsequently thereto, by consent of the plaintiff and the wife, Bertha E. Rhoads, the said rule was made absolute.

At the trial, the evidence was conclusive that if the necessities were supplied to the wife of the said defendant for her maintenance and that of her child, it was upon the specific contract of the husband and not upon any contract relation entered into by the wife. The jury were given binding instructions that there could be no recovery in the action against the wife; that if the testimony of the plaintiff was true, then there could be a recovery for whatever sum they found he had expended in fulfillment of such contract relation. The jury returned a verdict in favor of the wife, Bertha E. Rhoads, and against Charles D. Rhoads, for the amount of the plaintiff's claim.

The defendant contends that there cannot be two verdicts. The plaintiff contends that there can be a finding by the jury in an action of this nature in favor of the wife and against the husband. For this reason, the defendant bases his motion for a new trial and arrest of judgment.

In an action of this kind it has been held: First, in the case of *Murray vs. Keyes*, 35 Pa. 384: "Looking at the substance of a very informal proceeding, we consider it of no importance that the jury was sworn as to both husband and wife and two verdicts taken, one against the husband and the other for the wife." Second: *Lippincott vs. Hopkins*, 57 Pa. 328: Mrs. Lippincott's counsel asked the court to charge, in her second request, that a separate recovery cannot be had against a married woman who is joined in the action with her husband; and in the fourth request, that the pleadings in this case show that the defendants are husband and wife, and as there is no issue joined as to him, there cannot be a separate verdict against the wife. The court declined to charge as requested; the judgment was affirmed. Third: In the case of *Roll vs. Davidson*, 165 Pa. 392, it is held that where a suit has been brought against husband and wife before a justice of the peace for necessities, and the judgment against the wife had been erroneously reversed by the Common Pleas, but the judgment against the husband sustained, the plaintiff may subsequently bring an action against the wife alone.

We must conclude that the cases cited sustained the position taken in the trial of the case, that the verdict of the jury was formally correct in the practice applicable to cases of this kind.

Motions denied.

In the Court of Quarter Sessions of Philadelphia County, No. 1; January Sessions, 1906.

MOTION TO VACATE ORDER FOR SUPPORT.

Commonwealth vs. Neese.

A brother is not liable under the laws of Pennsylvania for the support of an indigent, insane sister. Neither the Act of April 8, 1861, Sec. 4, P. L. 248, nor that of June 13, 1836, Sec. 28, P. L. 539, imposes such liability on him.

Mr. Ziba T. Moore, for petitioner.

Messrs. William T. Connor and John L. Kinsey, for Bureau of Charities.

Opinion by Barrett, J., January 29, 1906.

On March 31, 1898, Mary Neese, a sister of the defendant, Adam J. Neese, was committed to the State Hospital for the Insane at Norristown, Pennsylvania, where she is still confined.

On November 14, 1905, upon the petition of Thomas F. Connell, on behalf of the Department of Public Health and Charities of the City of Philadelphia, an order was made upon Adam J. Neese for the support of his sister, the said lunatic, directing and requiring him to pay to the Department of Public Health and Charities of the said city the sum of \$1.75 per week.

Adam J. Neese, the defendant, now moves the court to vacate the order against him for the support of his insane sister, alleging the order was improvidently made, as under the law he is without liability. Defendant's inability to pay the order or any other irregularity in its making is not alleged. The facts are admitted and they raise but a single question, viz.: Is a brother liable under the laws of the State of Pennsylvania for the support of an indigent, insane sister?

It is not denied that there exists the same liability upon relatives for the support of their indigent insane relatives as there is on them for the support of their poor and destitute relatives who are not insane, as the Act of April 8, 1861, Sec. 4, P. L. 248, provides: * * * "The overseers of the poor of the township shall have remedy over against the property of the pauper or against any relative, required by law to maintain him or her, to the extent of their liability under the poor laws."

Blackstone says (Sharswood's Edition), Book 1, chap. 9, page 359: "The poor of England, to the time of Henry VIII., subsisted en-

tirely upon private benevolence, and the charity of well disposed Christians. For, although it appears by the mirror, that by the Common Law the poor were to be sustained by parsons, rectors of the Church, and the parishioners, so that none of them die from default of sustenance; and though by the Statutes, 12 Rich. II., c. 7 and 19 Henry VII., c. 12, the poor are directed to abide in the cities and towns wherein they were born, or such wherein they had dwelt for three years (which seemed to be the first rudiments of parish settlements), yet till the Statute 27 Henry VIII., c. 55, I find no compulsory method chalked out for this purpose, but the poor seem to have been left to such relief as the humanity of their neighbors would afford them."

So that at common law there was no positive obligation on any relative for the support of his poor relations, and no way prescribed for their maintenance, except, of course, the liability of a parent for necessities for minor children and that of a husband for necessities for his wife: 22 Am. & Eng. Ency., 1015.

The first statute making relatives liable for the support of their poor relations, was the Statute of 43 Eliz., ch. 2, English Statute at Large, 703.

By section 7 of that statute, it was provided: "That the father and grandfather, and the mother and grandmother, and the children of every poor old blind, lame and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner; and according to that rate by the justices of Peace of the County where such sufficient persons dwell, or the greater number of them, at their General Quarter Sessions, shall be assessed, upon pain that everyone of them shall forfeit twenty shillings for every month which they shall fail therein."

This statute enumerates all the relatives liable for support in England.

This question was before the court in *Rex. vs. Smith*, 2 C. & P. 449.

There was an indictment for assault on George Smith, a brother of the defendants. The counsel for the prosecution stated he was not prepared to prove an assault by beating, but contended that there was a duty on the defendants to provide for the support and subsistence of

their brother, and they having neglected that duty, and the brother having suffered as a result of such neglect, the defendants were liable for an assault.

Burroughs, J., in directing a verdict of acquittal, said that there was no such duty as the prosecution contended for, a duty to support and maintain a brother.

There being no common law liability, we must turn to our own statute of June 13, 1836, Sec. 28, P. L. 539, evidently founded upon the Statute of Elizabeth, which provides: "The father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work shall, at their own charge, being of sufficient ability, relieve and maintain such poor person at such rate as the Court of Quarter Sessions of the county where such poor person resides shall order and direct, on pain of forfeiting a sum not exceeding \$20 for every month they shall fail therein, which shall be levied by the process of the said court, and applied to the relief and maintenance of such poor person."

This act was lately before us in the case of *Commonwealth vs. Ulrich*, 14 District Reps. 713, and the history of the act is there given with its amendments and modifications, so it is unnecessary to repeat it. A brother is not the father, grandfather mother, grandmother, child or grandchildren, who are the only persons mentioned in the act. Our conclusion is, only those relatives specifically named in the act are liable for the support of their poor relations. A brother is not so named, and until the legislature does so, we are obliged to hold he is without liability for the support of his insane sister.

Although, as was argued by the Assistant City Solicitor for the Commonwealth, there should exist a moral obligation on the part of a brother who is in good circumstances to willingly contribute \$1.75 per week for the support of a sister or brother who is less fortunate and who is indigent and insane, yet when he does not recognize this moral obligation but prefers to have his sister maintained as a pauper by the taxpayers of the county, the court is unfortunately without power to enforce it as a moral obligation. The court can only enforce legal obligations. The prayer of the petition is granted, the order heretofore made directing defendant, Adam J. Neese, to pay \$1.75 per week for the support of his sister is vacated and rescinded, and the petition of Thomas F. Connell for such order is dismissed.

*In the Orphans' Court of Philadelphia County, No. 215, January Term,
1886.*

PETITION AND ANSWER.

Elton's Estate.

A petition for the removal of a trustee must embrace all the parties in interest, and where one of three cestuis que trust directs her petition for removal to the trustee only and fails to bring in the other cestuis que trust, the petition will be dismissed, without prejudice, however, leave being given to amend.

Mr. G. S. Graham, for petitioner.

Messrs. Robert J. Savidge and Joseph Savidge, for respondent.

Opinion by Dallett, J., January 20, 1906.

The petitioner asks the removal of the respondent, trustee under the will of her father, alleging that as trustee he is managing the trust estate in his own interest and regardless of the interests of the *cestuis que trust*. The respondent denies all averments of mismanagement or use of the trust estate for his personal benefit.

By his will the testator, who died December 29, 1884, directed that his estate should be divided into equal shares (except that one of them should be charged with certain expenses), and allotted one to each of his four daughters, which shares should be held in trust by his son-in-law, his executor, for the sole and separate use of his daughters, they to receive the income for their lives with power of appointment by will, and in the event of a failure to exercise the power, then to their children or the issue of deceased children, or, there being no child or issue, to testator's surviving daughters upon the same trusts, etc. All the daughters survived the testator.

The petition was filed by one of them and the citation directed to the respondent only. Another daughter has died since the filing of the petition, leaving no child or issue and without having exercised the power of appointment, and her share is now held for the surviving daughters.

The general rule of equity practice is that all persons materially interested in the subject-matter, or who will be affected by the decree prayed for, must be made parties to the proceeding: Story on Equity Pleading, Sec. 72; 1 Beach on Modern Equity Practice, Sec. 54; Calvert on Parties, 11 and 218; Delbert's Appeal, No. 3, 4 W. N. C. 294;

Ford vs. Terry et al., 17 Phila. 279; Lance's Appeal, 112 Pa. 469. This rule has not been adhered to in this case.

At the time of the filing of her petition, the petitioner was entitled to the income from one of the four shares; her interest has been increased by the addition of her third of the share of her deceased sister, but the two remaining sisters are now entitled to the income derived from the remaining two-thirds of the estate, and they have not been made parties.

The petition as presented for the removal of the trustee from his trusteeship of the whole estate must therefore be dismissed for want of necessary parties, without prejudice, however, leave being given to amend.

We think it proper to add, without discussing the merits of the subject-matter, that inasmuch as it appears from the testimony that two of the sisters are satisfied with the present management of their interests in the trust estate, and as the respondent has declared in his answer that if the petitioner "desires the principal of said estate to be divided and allotted * * * and her share or portion of principal so allotted to be held by a trustee other than respondent, your respondent will assist in any proper and legal manner the accomplishment or fulfillment of such desire," we see no reason why under the provisions of the will, such a division should not be made and the share of the petitioner separated and held by a new trustee to be appointed upon her petition, and the apparent wishes of all the parties in interest so complied with.

In the Court of Common Pleas of Lackawanna County.

DIVORCE.

RULE FOR DECREE.

William H. Bonna vs. Esther Bonna.

Those Statutes which extend the jurisdiction of the courts of this state to causes of divorce occurring in foreign countries, do not in terms profess to give the courts power to acquire constructive jurisdiction of the person of a non-resident respondent who has never been domiciled in the state.

Opinion by Newcomb, A. L. J., March 5, 1906.

The cause of divorce alleged in this case is desertion. The evidence establishes a marriage in 1897 in Wales, where both parties were then domiciled. Shortly afterwards the husband came to this country

and took up his residence here, expecting to send for the wife later. In a few short months he did so, making all necessary provision to enable her to join him. But this she refused, and the refusal has been persisted in ever since. He has continued to reside here and she has remained in Wales. The parties have never had a common domicile in this state, and there has been no personal service of process on the wife, nor voluntary appearance in the suit on her part. Under such circumstances this court has uniformly held that we are without personal jurisdiction of the respondent. Those statutes which extend the jurisdiction of the courts of this state to causes of divorce occurring in foreign countries do not in terms profess to give the courts power to acquire constructive jurisdiction of the person of a non-resident respondent who has never been domiciled in the state. Whether it would be competent for the legislature to do so need not be discussed. For if within its power to confer such jurisdiction it must be done in express terms and not by mere implication.

The respondent not being in court it follows that no decree can be made against her. The rule to show cause is, therefore, discharged, and the proceeding dismissed.

In the Court of Common Pleas of Lackawanna County, No. 301, September Term, 1902.

DEMURRER TO SCI. FA.

City of Scranton vs. Edward M. Clark.

There is no reason to convince a court that the general act of 1891 repeals the 21st section of the act of 1889, relating to liens in cities of the third class, although some of the provisions of the former act are different.

D. J. Davis, City Solicitor, for plaintiff.

Mr. T. P. Duffy for defendant.

Opinion by Edwards, P. J., March, 1906.

We are not disposed to question the rule of practice invoked by defendant's counsel, viz., that a material defect in a municipal lien can be taken advantage of by demurrer as well as by a motion to strike off the lien, even after a writ of scire facias has been issued, if the demurrer is interposed before plea is entered; although, the practice in our court has been to remove to strike off the lien in such cases. The ground of defendant's demurrer is that the lien was filed three days too

late; that is, the lien was filed June 7, 1897, while the date of the assessment is given in the lien as December 4, 1896. Defendant's counsel takes it for granted that the lien was filed under the act of 1891. If this contention is incorrect the ground of demurrer fails. Why is not the lien good under the third class city act of 1889? We are of the opinion that the lien was filed under the act of 1889, which requires that the lien shall be filed within six months from the completion of the work. The lien states that "said work was fully completed within six months preceding the date of this lien." We know of no reason to convince us that the general act of 1891 repeals the 21st section of the act of 1889 relating to liens in cities of the third class, although some of the provisions of the former act are different. For instance, the act of 1891 provides that the lien shall date "from the time of the final confirmation of the report * * * or a final decree of the court fixing said assessments," whereas the act of 1889 provides that the lien shall date from "the completion of the work." The act of 1891 has no repealing clause.

We do not intend to deprive the defendant of the privilege of raising this question at the trial of the case. The decision as to which act the lien is filed under should be made only after argument on both sides. The demurrer was submitted without argument; hence, we shall allow the defendant to raise this one question regardless of any plea he may file.

The demurrer is overruled.

In the Court of Common Pleas of Cumberland County, No. 155, September Term, 1905.

PETITION OF THE UNITED TELEPHONE AND TELEGRAPH COMPANY FOR CITATION ON THE BOROUGH OF CARLISLE.

United Telephone and Telegraph Company's Petition.

A license fee imposed upon a telegraph or telephone company by a municipality in excess of that required for police supervision is unreasonable, and its collection cannot be enforced.

The Act of April 17, 1905, P. L. 183, which authorizes the Court of Common Pleas for the proper county to determine the amount of annual license fee to be paid to the municipality in order to properly compensate it for all necessary cost of the services performed in the inspection and regulation of poles, wires, conduits, etc., does not abridge the police supervision by the municipality, but merely provides the means of as-

certaining the cost of such necessary supervision and regulation and fixing the amount thereof.
As municipal corporations are not within art. 1. sec. 6, of the Constitution, guaranteeing trial by jury, the act does not offend against that section. Circumstances considered under which a license fee of 75 cents a pole imposed by ordinance was held excessive, and the fee was fixed by the court at 10 cents for every pole owned by the company erected in the borough.

Mr. S. B. Sadler and Hon. F. E. Beltzhoover, for petitioner.

Messrs. J. E. Barnitz, A. R. Rupley and C. S. Brinton, for respondent.

Opinion by Sadler, P. J., November 17, 1905.

The proceeding in this case has been instituted under the provisions of an Act of Assembly, approved April 17, 1905, P. L. 183, by which it is enacted that "Whenever any dispute shall arise between any township, city, borough or other municipal corporation, and any telegraph, telephone or light or power company, as to the amount of the license fee named in any ordinance for the inspection and regulation of the poles, wires, conduits or cables of the latter, that petition may be made by either party to the Court of Common Pleas of the county where the municipal corporation is situated, setting forth the nature and character of the dispute and requesting a determination of the same, whereupon a citation shall issue to the other party, and that, after the return-day fixed for answering the same, evidence shall be taken and the dispute decided in the way and manner provided by law for the hearing of cases in equity."

By the third section of this act it is provided that "The said court, in its decision of said dispute, shall determine the amount of annual license fees which should be paid to the said municipal corporation, in order to properly compensate it for the necessary cost of the service performed, or to be performed by it, for the inspection and regulation of the poles, wires, conduits or cables of said telegraph, telephone, light and power company."

And by the fifth section, that "The amount of such annual license fees as determined by the final order of the court shall continue until altered by the court itself; but no application shall be made for that purpose oftener than once in two years."

This legislation was manifestly suggested and enacted by reason of the frequent contentions which had arisen between municipal cor-

porations, cities, boroughs and townships, and telegraph, telephone and electric light and power companies, in reference to license fees imposed on poles and wires, and claimed to be requisite to reimburse the said municipal corporations for the outlays incurred by them in the inspection and regulation of the same.

There was no uniformity in these exactions, and the amounts in many cases were in fact in excess of the outlay which the city, borough or township was put to by reason thereof, and it finally became evident to the courts that under the guise of fees for the proper inspection and regulation of the poles and wires to protect the life and property of the citizen, taxes were in fact imposed which were devoted to replenish the treasuries of the corporation imposing them, or to provide for other municipal needs.

Finally, in *Postal Tel.-Cable Co. vs. Taylor*, 192 U. S. 64, the Supreme Court of the United States, Justice Peckham delivering the opinion, overruling the determination of the Supreme Court of Pennsylvania, decided the grounds upon which this kind of a license or tax is justifiable, and that "the same must be limited to an amount necessary to reimburse the borough for expenditures made in the inspection and regulation of the poles and such other expenses as it may be reasonably anticipated will have to be borne by it in connection therewith."

"The liability to pay for injuries that might arise from the bad condition of the poles and wires, arising from the neglect of the company to inspect and supervise the same, is not a liability which the municipality is entitled to recover from the company in advance of its happening, but it is simply one of the reasons for an inspection by the borough, which shall be most carefully and continuously performed, in order that injuries may not arise from the neglect of such supervision."

Any license fee, therefore, ordained by a municipality in excess of that required for police supervision is unreasonable, and its collection cannot be enforced. The telegraph company in that case, like the petitioner in the present one, was engaged in interstate business.

In the case of *Lower Merion Township vs. Tel. Cable Co.*, 25 Pa. Superior Ct. 306, the ruling of the Supreme Court of the United States was recognized and adopted, and so also in *Norwood Borough vs. Tel. Co.*, 25 Pa. Superior Ct. 406.

"The charge is not imposed in the exercise of the taxing power for

general revenue purposes, but in the exercise of the police power to meet the expenses arising from the duty of municipal supervision:" *Braddock Borough vs. Tel. Co.*, 25 Pa. Superior Ct. 544.

"The elements which enter into a license tax by a borough on telegraph poles and wires are the necessary or probable expenses incident to the issuing of the license, and the probable expenses of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires:" *Schellsburg vs. W. U. Tel. Co.*, 26 Pa. Superior Ct. 343.

The Act of Assembly under which the proceeding has been instituted is therefore, in effect, an embodiment of what the courts of last resort have adjudged to be the objects for which licenses may be ordained and the limit of the same, and provides the machinery for determining the amount thereof.

The act does not, as was insisted upon at the argument, abridge the police supervision by municipalities. It merely provides a means of ascertaining what is the cost of such necessary supervision and regulation of poles, wires, conduits and cables; and for fixing the amount thereof.

Nor is it in violation of art. 1 sec. 6, of the Constitution of the State.

In *Borough of Dunmore's Appeal*, 52 Pa. 374, in a contest as to the distribution of the indebtedness between a township and the boroughs erected out of it, Justice Woodward, in delivering the opinion of the Supreme Court, said: "This legislation is unprecedented and perhaps severe, but it denies trial by jury only to municipal corporations, who, being creatures of the legislative power, are subject to the legislative will in a manner and to an extent which citizens are not. The constitutional guarantees of the citizen were respected in giving him a right of appeal; the municipal corporations having no such guarantees, the right of appeal was not given to them."

And in *Simpson vs. Neill*, 89 Pa. 183, in passing upon the Act of April 8, 1851, which conferred upon the Board of Port Wardens jurisdiction over controversies in regard to wharfage in the City of Philadelphia, the court said: "All the property on the river front of the city below low water mark of the river Delaware is held merely by license.

from the Commonwealth, under and subject to such laws and restrictions as the legislature has seen fit to enact."

From the evidence adduced before us, the following facts have been established and are found: That the United Telephone and Telegraph Company (formerly the Southern Penna. Tel. Co.) secured a franchise from the Borough of Carlisle, authorizing it to plant its poles and string its wires by an ordinance approved September 19, 1898; that it is engaged in interstate business; that it has 397 poles in the Borough of Carlisle, and that there is an aggregate number of 1979 poles planted within the corporate limits of the municipality; that by an ordinance of said borough, passed November 8, 1888, it was provided, that the erection and planting of poles of telegraph and telephone lines shall be under the direction of the street committee; that the said Borough of Carlisle enacted an ordinance on November 25, 1902, by which it is provided that an annual license fee of 75 cents shall be imposed on all poles of telegraph, telephone, electric light and electric railway companies, now erected or hereinafter to be erected in said borough; that the poles of the petitioning company are of wood, well adapted for the purpose, and the lines of the company were built about six years ago, and are well constructed; that not more than one complaint about the same, of any kind, if any, has ever been made by the municipal authorities to the company, and the character of this complaint was not shown; that linemen go over portions of the line daily and cover the whole line, certainly, as often as four times a year, and that in so doing they inspect and exercise an oversight of the poles, cross-arms and wires, and that a careful inspection of the whole line was made during the past summer, and also about eighteen months ago; that no poles or cross-arms have ever fallen, nor has it appeared that any person in the Borough of Carlisle has ever suffered on account of an accident from defective poles, cross-arms or wires; that the uniform testimony of those who have such knowledge and experience as to be regarded as experts, was that one inspection a year of the poles is sufficient, and we so find and determine; the time required for making a proper inspection of all the poles, according to the testimony of Mr. Ramsay, the only competent expert called by the defendant, would be less than twenty-four days and the cost somewhat under \$60, while George Ehler, who has inspected five thousand poles in the City of Harrisburg,

annually, at the instance of the highway commissioner, for a number of years, stated that it required him thirty-two days and his charge to the city for services was \$80. The cost, therefore, of inspection, according to the testimony of Mr. Ramsay, would be about 3 cents for each pole, and according to the testimony of Ehler less than 2 cents. Other experts were of the opinion that the inspection could be made in much less time than that fixed by those above named; that the inspection made by the police of the borough was most cursory in character and not such as is required to determine whether poles are defective or not; no pointed iron instrument was ever used by them to test the soundness or unsoundness of the poles at the ground, where decay is to be apprehended, and which all experts agree it is necessary to use for that purpose, nor did it appear that any of them had ever mounted a pole to determine its condition at the top, or between that and the ground, or of the cross-arms; that no payment has ever been made by the borough treasurer for the inspection of poles. Indeed, we find that it has affirmatively appeared that in fact no proper inspection of the poles on the part of the borough authorities or their employes, by which they could determine whether they were safe or otherwise, was ever made. Again, the continuous attention, which the companies give to their lines, reduces to a minimum the danger to be apprehended from neglect, in regard to their poles and lines of wire, while their self-interest gives a high degree of assurance that at no time will there be need of much attention to or supervision of them by the municipality.

As a matter of law, we determine that the annual license fee of 75 cents, imposed by the ordinance of November 25, 1902, is so much in excess of the necessary cost for a proper inspection and regulation of the poles, wires, cables and conduits of the petitioner, that the same is unreasonable and therefore void.

While, under the evidence, it seemed that the cost of inspection has not exceeded 3 or 4 cents per pole, yet, taking into consideration, however, the fact that there is a likelihood that there will be an increase in the decay of the poles of the petitioner in the future on account of increased age, and that a careful and possibly more frequent inspection will be required hereafter than in the past, we have concluded that a license fee of 10 cents will make liberal provision for the police inspection and regulation required on part of the borough, and not be unduly

oppressive upon the corporation owning the poles, wires and cables, and have therefore concluded to fix the license fee to be paid by the petitioners at that sum.

And now, November 17, 1905, 10 cents is fixed as the annual license fee to be collected by the Borough of Carlisle from the United Telephone and Telegraph Company for each and every one of its poles located in the said municipality.

NOTE—See *W. Conshohocken Borough vs. Conshohocken Electric Light and Power Co.*, 29 Pa. Superior Ct. 7.

In the Court of Common Pleas of Dauphin County, No. 62, January Term, 1906.

OBJECTIONS TO NOMINATION PAPER.

Schaeffer's Nomination.

The Democratic party of the 23d judicial district regularly nominated E. for judge. The Independent Democratic party of the same district nominated S. by nomination papers. The former objected to the use of the word "Democratic" by the latter in its political appellation. Held: That the objection was sustainable, but the nomination paper was defective only, and could be amended by eliminating the word "Democratic."

Mr. B. M. Nead, for objections.

Messrs. W. B. Bechtel and Snodgrass & Snodgrass, contra.

Certain qualified electors of the 23d judicial district, comprising the county of Berks, and members of the Democratic party which said party had duly nominated James N. Ermentrout for judge, filed objections to the nomination paper of the Independent Democratic party of Berks county which named D. Nicholas Schaeffer for the same office of judge. Among the objections was the following: "Third. The parties filing the same have no right to the use of the word Democratic, in the said name, and have no right to couple the word Democratic, with the word, Independent, as a party or political appellation."

The attorney for the signers of the Independent Democratic party filed an answer contending that the objection pointed out an amendable irregularity, and asked leave to strike out the word Democratic in the political appellation.

Thereupon, October 11, 1905, the Court, Weiss, P. J., allowed the amendment.

In the Orphans' Court of Philadelphia County, No. 220, January Term, 1904.

**CITATION TO GUARDIAN TO PAY ARREARAGES FOR
SUPPORT AND EDUCATION.**

Ervien's Estate.

A guardian must not only preserve the property of his ward so as to ensure a continued income therefrom, but must also provide for the needs of his ward during minority, and if, for any reason, an order directing the guardian to pay a sum certain per week for the support and education of the minor is no longer necessary or is for too great an amount, it is the guardian's duty to make proper application to the court to have it vacated or modified. Until he does so, however, it will be presumed necessary and proper and must be complied with.

Mr. H. L. Henderson, for petitioner.

Mr. Maxwell Stevenson, for respondent.

Opinion by Dallett, J., March 8, 1906.

Without questioning the validity of the appointment of this guardian by the mother's will, which (as the minor's father is still living) we presume was under circumstances authorized by the Act of May 25, 1887, P. L. 264, nor discussing in this proceeding the propriety of the order as made for support and education, it need only be said that the decree was dated January 30, 1904, and directed the payment to the petitioner of \$2.50 per week for the support and education of the minor.

It appears by the petition, sworn to October 3, 1905, that up to that date the respondent had paid but \$130 on account of the order. It appears by the answer, sworn to December 2, 1905, that from June 15, 1903, to November 29, 1905, he received \$540, of which he has expended, in addition to the \$130 for support and education, \$100 for a piano and \$223.47 for taxes and repairs to the minor's real estate, leaving a balance in his hands of \$86.53. He further avers that the tenant of the property has demanded that certain repairs and improvements be made (of which he apparently approves), and that it is, consequently, impossible for him to comply with the order of the court.

The order was not made for past maintenance, as appears to be assumed by the petitioner, but for \$2.50 per week from the date the decree was entered; the balance in the hands of the guardian, therefore, if expended as directed, will be sufficient to pay the arrearages due to a date subsequent to the date of the filing of the petition. We think it should be so expended.

While it is undoubtedly the duty of a guardian to care for the real estate of his ward and to make necessary and proper repairs to preserve the property and so ensure a continued income therefrom, he has another no less important but very necessary duty to perform—to provide for the needs of his ward during minority: *Stanton's Estate*, 13 Phila. 213.

If, for any reason, the order is no longer necessary or is for too great an amount, it is not only within the power, but it is the duty of the guardian to make proper application to the court to have it vacated or modified; until he takes such action, we must presume it is necessary and proper: *Norris' Estate*, 46 Legal Intell. 270.

The prayer of the petition is granted.

In the Court of Common Pleas of Luzerne County, No. 2, December Term, 1905.

DEMURRER TO BILL IN EQUITY.

Shepard vs. Davidow.

A lease for one year with a right to renew for three years is within the statute of frauds, and authority to make it must be in writing.

Messrs. J. O. Main and H. A. Fuller, for plaintiff.

Mr. Q. A. Gates, for defendant.

Opinion by Ferris, J., Nov. 20, 1905.

The bill avers that by a written instrument dated January 25, 1904, A. C. Campbell as attorney for H. W. Palmer, then owner of certain real estate, and having oral but no written authority so to do, leased the premises in question to the plaintiff for the term of two years from April 1, 1904, with an agreement that the lease might be renewed for a further term of three years from April 1, 1906, provided a lease be signed for the same on or before January 1, 1906, that the premises have since been sold to the defendant subject to the plaintiff's rights under this lease, that the plaintiff has notified the defendant of his desire to extend the term for three years from April 1, 1906, and has prepared, signed and presented to the defendant a written lease to that effect, but that the latter refuses to so extend the term and sign the new lease as presented, and has given the plaintiff a notice to quit on April 1, 1906. The prayers are for a decree compelling the defendant to

sign a new lease renewing the present one (1) for three years (2) for two years, or (3) for one year from April 1, 1906.

The bill sets forth no ground for the relief sought by prayers (2) and (3). The agreement was for an extension for three years, and the Court cannot make a new contract for the parties. If the plaintiff is entitled to any extension at all it is for the additional term agreed upon and no other.

The case, however, falls directly within the statute of frauds. The lease with the proposed extension covered a period of more than three years, and was made by an agent not "thereunto lawfully authorized by writing." It therefore had the effect, so far at least as the agreement for the additional term is concerned, of a lease at will, and the lessor's grantee has given due notice of his intention to repossess the premises at the expiration of the current year, April 1, 1906.

The demurrer is therefore sustained.

*In the Orphans' Court of Philadelphia County, No. 413, April Term,
1904.*

PETITION FOR ORDER TO PAY.

Sweeney's Estate.

An accountant must present a set-off against the share of a distributee at the audit of his account, and, failing to do so, cannot deduct from the award made to the distributee in the schedule of distribution the value of personal property alleged to be the property of the decedent and retained by the distributee.

Mr. R. J. Wright, for petitioner.

Mr. William H. Burnett, for respondent.

Opinion by Hanna, P. J., March 3, 1906.

This is a petition for an order to pay an award. It is shown a schedule of distribution of the balance in the hands of the accountant was approved by the auditing judge and the sum mentioned in the petition awarded to the petitioner. The administratrix now claims to deduct from the award the value of a piano which she alleges was the property of the decedent, and is retained by the petitioner. Whether this be true or false is immaterial, and it is too late for the administratrix to set off any such claim against an award and judgment of the court. Her duty was to present the set-off against the share of the petitioner at the audit of the account, when, if the claim be established,

all the parties interested would be entitled to share in the addition to the balance of the estate.

And prior to the filing of the account the accountant could insist upon the delivery to her of the personal property which she alleges belonged to the decedent.

As the case is now presented, the answer must be overruled, the order to pay made absolute, and accountant directed to pay petitioner the amount of the award, with interest, within ten days from the date of this decree.

In the Court of Common Pleas of Erie County, No. 126, February Term, 1905.

RULE TO SHOW CAUSE OF ACTION.

Black vs. Brown.

A rule on plaintiff in a foreign attachment to file his affidavit of cause of action cannot be maintained by defendant and garnishee after they have entered a general appearance.

Mr. J. W. Sproul, for defendant and garnishee, and for the rule.

Mr. W. Pitt Gifford, for plaintiff, and against the rule.

Opinion by Walling, P. J., August 7, 1905.

On January 12, 1905, a writ of foreign attachment was issued in the above case, returnable to February Term, 1905, and on February 16, 1905, a general appearance was entered both for the defendant and for the garnishee.

On June 5, 1905, a motion was made on behalf of the defendant and garnishee for a rule on plaintiffs to file their cause of action on oath.

Plaintiffs resist this rule on the ground that such an application cannot be granted after the defendant is in court by a general appearance.

In our opinion, the plaintiffs' position is well taken. In section 64 of the Act of June 13, 1836, P. L. 568, it is provided that "It shall be lawful for any defendant in an attachment, instead of giving bail or security, at his election, at any time before judgment obtained in the attachment, to cause an appearance to be entered for him, and to take defence to the action, in which case the action shall proceed as if commenced by a summons; but the attachment shall, nevertheless, continue to bind the estate or effects attached as in other cases, unless judgment

be entered for the defendant in said attachment, and if judgment be rendered for the plaintiff, such judgment shall have the like force and effect as in case of an action commenced by a summons."

The object of the attachment is to compel the appearance of the defendant, and when he appears the case proceeds as if commenced by a summons. The general rule that all defects in the process, service, etc., are cured by a general appearance applies as well to a suit commenced by a writ of foreign attachment as to other cases. Before a general appearance the defendant, or the garnishee, may move to quash the writ or have a rule on plaintiff to show his cause of action and why the writ should not be dissolved, but such right is waived by appearance: *Lansford Borough vs. Jones*, 5 District Reps. 483, and cases there cited.

And where the defendant has appeared, the garnishee is not entitled to call on the plaintiff to show his cause of action: *Sisk & Co. vs. Kenyon & Co.*, 2 Ches. Co. Reps. 422.

And if, after the defendant's appearance, neither he nor the garnishee can call upon plaintiff to show his cause of action, we are unable to see upon what ground they may jointly do so.

Such right is extended to the garnishee to protect the interests of the absent defendant, but when the defendant is in court by appearance, he can protect his own interests.

And now, August 7, 1905, the rule to show cause why a rule should not be granted on plaintiffs to show their cause of action is discharged.

Failure to anticipate the presence of a man on his hands and knees on the track in front of an electric car on a dark night, and to run the car so as to provide for that contingency, is held in *Vizacchero vs. Rhode Island Co.* (R. I.) 69 L. R. A. 188, not to be negligence on the part of the motorman.

The mayor and chief of police of a city are held, in *Mumford vs. Starmont* (Mich.) 69 L. R. A. 350, to be liable in damages in case they arrest motormen of street cars to abate a nuisance caused by the operation of the cars, when the trolley wire is in such poor condition as to be liable to fall, when the object can be effected by merely cutting the wires, or removing the controllers from the cars.

In the Court of Common Pleas of Lackawanna County, No. 4, September Term, 1899.

RULE TO STRIKE OFF LIEN.

City of Carbondale vs. Alexander Gillis.

It is a mistake to suppose that in cities of the third class municipal liens are regulated by the Act of 1889 and not by the Act of 1891.

Opinion by Gunster, A. L. J., December 18, 1899.

The lien in this case was filed July 3, 1899. It states that the assessment was made September 8th, 1898. As we stated in the case of the City of Scranton vs. McLaughlin, No. 20, September Term, 1897, under the Act of 1891, P. L. 69, the claim remains a lien "if filed within six months from the final assessment." It is a mistake to suppose that in cities of the third-class municipal liens are regulated by the Act of 1889 and not by the Act of 1891. The former act must yield to the latter when they conflict.

In the Court of Common Pleas of Lackawanna County, No. 1, May Term, 1902.

SITTING IN EQUITY.

John B. Law, et al. vs. E. L. Fuller.

As a general legal proposition the president of a corporation, who purchases the property of the corporation at a public sale, holds it as a trustee for its stockholders.

If the president of the corporation has any knowledge of facts that would give the property of the corporation a possible prospective value beyond its apparent value, he is bound to communicate such knowledge to his fellow stockholders in case he procures a sale of the property to himself.

If, with such knowledge uncommunicated to his fellow stockholders he becomes a purchaser of the corporate property at a sale, whether public or private, he holds the same as a trustee for his fellow stockholders, and if he thereafter sells the property at a profit, he is bound to account to them for such profit.

A director or officer of a corporation has the right to become a creditor of the corporation if the necessities of the case require it. He may advance money to meet the needs of the corporation, and if he does so, he has the same rights as other creditors. He has the right to secure a judgment for the amount of his indebtedness, and to take the corporate property in execution for the payment of such judgment, and if it becomes necessary, in order to protect his judgment, for him to bid upon the property and to become the owner of it, he has the right to do so.

While it is true that generally speaking a director of a corporation cannot acquire the property of the company either at private or public sale to the prejudice of a stockholder, yet there are exceptions to this general rule. He may loan money to the company and take security for it, and he may enforce such security in the same manner as any other creditor if he acts in entire good faith.

The only just and practical doctrine is that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith.

Before a shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances. The shareholder should set forth in his bill the efforts that he has made to induce the corporation to act in the matter, should allege its refusal or failure to sue, and facts showing that he has left undone nothing which in reason he might have done to prevail on the corporate management to bring the action.

Messrs. J. B. Woodward and Joseph O'Brien, for plaintiffs.

Messrs. E. N. Willard and H. A. Knapp, for defendants.

Opinion by Kelly, A. L. J., April 2, 1906.

The bill in this case was originally filed by John B. Law as plaintiff, but subsequently an amendment was filed by adding the name of Alexander B. Law, as a stockholder in The Girard Coal Company, as a party plaintiff. Subsequent to the trial of the case a petition was presented praying that the case might be reopened to afford the plaintiffs an opportunity of presenting additional evidence, and a rule to show cause was granted. Depositions in support of the rule were taken and submitted to us with an agreement of counsel that if the rule should be made absolute the depositions might be submitted as the additional evidence which the plaintiffs desired to present. We have this day made the rule absolute and admitted the evidence contained in the depositions as evidence in the case.

From the evidence we find the following facts:

FINDINGS OF FACT.

1. The Girard Coal Company was incorporated on the 8th day of July, 1895, with a capital stock of \$100,000, divided into 2,000 shares of the par value of \$50 each. Originally the stock was subscribed for and held as follows: Frank T. Patterson, 797 shares; William Hill, 400 shares; E. L. Fuller, 400 shares; John B. Law, 400 shares; John J. McBride, 1 share; William J. Gallin, 1 share; and Alexander N. Hilliard, 1 share. The purpose of the corporation was the mining of coal in the Commonwealth of Pennsylvania, preparing the same for market, and selling the product from its mine, and the business was to be transacted in the city of Philadelphia. This company was engaged in

the coal mining business in Northumberland-County from 1895 until April, 1901, when its property was sold at sheriff's sale to The Seneca Coal Company for \$2,020.00.

2. From the time the Girard Coal Company began to do business until November 1, 1899, John B. Law, one of the plaintiffs, was the General Superintendent of its operations. On that date he was removed from that position. He was also a director of the company from its organization until February 6, 1901.

3. In 1892 John B. Law became interested in The Newton Coal Mining Company, a corporation engaged in the coal mining business in Luzerne County, and in 1893 he became interested in the Old Forge Coal Mining Company, also a corporation engaged in the coal mining business in Luzerne County, its property being adjacent to the Newton, and from 1893 until The Girard Coal Company was organized in 1895 he was general manager of these two companies, and from 1895 until November 1, 1899, he was the general manager of the three companies. During these years E. L. Fuller, the defendant, was a stockholder in the three companies, and he was the president of each of them in the year 1901.

4. The Seneca Coal Company, which became the owner of the property of the Girard Coal Company by purchase at sheriff's sale, in April, 1901, was incorporated on the 1st day of May, 1900, with a capital stock of \$100,000 divided into 1,000 shares of the par value of \$100 each. Originally the stock was subscribed for and held as follows: Frank T. Patterson, 333 shares; William Hill, 334 shares; E. L. Fuller, 331 shares; Mortimer B. Fuller, 1 share and Henry Sively, 1 share. Its purpose was the mining and preparing coal for market and selling the same. At the time it purchased the property of the Girard Coal Company E. L. Fuller was the owner of all of its stock except a few shares held by Mortimer B. Fuller, his son, James B. Neal, who was the general superintendent of the several properties in which he was interested, and Henry Sively, his clerk.

5. On the 26th day of February, 1901, The Old Forge Coal Mining Company, by a proper deed of conveyance, sold all of its property to the Seneca Coal Company for the sum of \$25,000. E. L. Fuller was the president of the Old Forge at that time, and H. H. Sively, his clerk, was the secretary, and the deed was executed by them as such.

In this deed it was provided that the Seneca Company assumed all the obligations of the Old Forge Company. The liabilities of the Old Forge at the time consisted of an indebtedness of \$48,162.74, with a contingent liability upon two suits for damages, for personal injuries, pending, while it had claims which passed to the Seneca Company amounting to \$65,702.75.

6. Sometime in the fall of 1900 the entire property of the Newton Coal Mining Company became vested in the Seneca Coal Company by Sheriff's sale, the real estate having been sold for \$500 and the personal property for about \$20,000.

7. The co-partnership firm of E. L. Fuller & Company was composed of the stockholders of the Old Forge Mining Company, which included E. L. Fuller and John B. Law.

8. From the time the Girard Coal Company first engaged in business up to the time its property was sold at Sheriff's sale to the Seneca Coal Company, it operated at a loss, which loss after deducting all moneys expended for betterments amounted to upwards of \$20,000. On the 1st day of March, 1899, it owed the Old Forge Company \$16,000, which on that day was paid by E. L. Fuller & Company, and the indebtedness transferred to them, and from time to time subsequently E. L. Fuller & Company advanced moneys to it, so that on the 1st day of October, 1900, it owed them \$38,000, and on the 1st day of February, 1901, with the interest included, it owed them \$40,961.17. E. L. Fuller personally advanced moneys to it from time to time beginning on the 8th of February, 1901, with a loan of \$10,000, which, with subsequent loans, amounted to \$13,000, and with interest added to \$13,090.33 on April 2, 1901.

9. A special meeting of the Board of Directors of the Girard Coal Company was held at the office of the company in the City of Philadelphia on 23d of January, 1901, for the purpose of authorizing the treasurer to give the company's note to E. L. Fuller & Company for money borrowed from them during the last two years, viz.: \$38,000 and "interest" as expressed in the notice prepared by the secretary of the company. This meeting was called by order of E. L. Fuller, the president, several days before the meeting was held, not later than January 17, 1901. A notice of this meeting was prepared to be sent to John B. Law on January 17, 1901, and was copied in the copying book

of the company, but whether mailed to him or not, was never received by him, and he had no notice of the meeting and did not attend it. At this meeting it was resolved to give the company's note to E. L. Fuller & Company for the amount of its indebtedness to them, \$38,000, with interest, amounting to \$40,961.17, and thereupon on the same day a promissory note was given to E. L. Fuller & Company for that amount payable on demand. And on the 2d of April, 1901, a judgment note in the usual form and with the usual waivers, payable on demand, was given to E. L. Fuller for \$13,090.33, the amount due him as above mentioned.

10. Suit was brought by E. L. Fuller & Company upon the promissory note given on January 23, 1901, on the 1st of February following, in the Court of Common Pleas of Northumberland County, to No. 1 May Term, 1901, and on March 16, 1901, judgment was entered in favor of the plaintiffs in default of an appearance, for \$41,322.99, with interest from that date, and on the same day a writ of *fi. fa.* issued. On April 2, 1901, judgment in favor of E. L. Fuller, to No. 285 May Term, 1901, in the same county, was entered on the judgment note given to him for \$13,090.33, and on the same day a writ of *fi. fa.* issued. By virtue of these executions the sheriff of Northumberland County, on April 6, 1901, sold all of the personal property of the Girard Coal Company to the Seneca Coal Company for \$2,020.00, including coal leases, etc., and which comprised all of the property of the Girard Coal Company.

11. Sometime in the latter part of January, or early in February, 1901, E. L. Fuller and Alfred Walter, the president of the Lehigh Valley Coal Company, entered into negotiations for the sale of the Newton, Old Forge and Girard properties to the Lehigh Valley Coal Company, and Mr. Fuller offered to sell them for \$850,000. The properties were examined on behalf of the Lehigh Valley Company, and the offer was held under advisement for a few days, when it was declared off by Mr. Fuller and the negotiations ceased. Mr. Fuller at that time, and for sometime before that, contemplated combining the three properties. Some two months before he had begun the erection of a steam plant which was to cost from \$100,000 to \$150,000, so as to mine from the Old Forge property through the Newton. And along about this time, in the spring of 1901, the breaker of the Girard was remodelled at an ex-

pense of \$12,000 to \$14,000, in an attempt to make the plant profitable. Early in June, 1901, the entire stock of the Seneca Coal Company was sold to the Lehigh Valley Railroad Company, for \$1,000,000, by which the railroad company acquired the three properties, the Girard, Newton and Old Forge. The Girard constituted but a small part, if any, of the consideration, and practically the same price would have been paid for the other two. According to an examination made of the Girard about that time on behalf of the purchaser, a valuation of \$40,000 was placed upon it, and it may be assumed as a fact that it entered into the consideration of the sale to that amount.

12. At the time of the sale of the stock of the Seneca company to the Lehigh Valley Company, the fair value of the Girard property was from \$50,000 to \$60,000.

13. The Girard Coal Company was dissolved on the 13th of November, 1902, by a decree of ouster made in the Court of Common Pleas of Dauphin County in quo warranto proceedings instituted by the Commonwealth with the Attorney General as relator. The proceedings were not contested but were acquiesced in by the company, and the decree was entered upon the suggestion of the Attorney General that its property had all been sold at Sheriff's sale, that it did not propose to further engage in business and had abandoned the enterprise for which it had been incorporated and the answer filed by Mortimer B. Fuller, as treasurer of the company, admitting the facts set out in the suggestion.

14. At the time this suit was begun both John B. Law and Alexander Law were stockholders in the Girard Coal Company.

15. E. L. Fuller was not guilty of any fraud upon the plaintiffs in bringing about the sheriff's sale of the property of the Girard Coal Company to the Seneca Coal Company, and in selling the stock of the Seneca Coal Company to the Lehigh Valley Railroad Company.

16. No request was ever made by the plaintiffs to the directors of the company to institute any proceedings against the defendant.

We find the following conclusions of law:

1. There is no evidence in the case to warrant the conclusion that the defendant has been guilty of either actual or constructive fraud.

2. The defendant did not by virtue of the Sheriff's sale of the

property of the Girard Coal Company to the Seneca Coal Company become a trustee for the stockholders of the Girard Company.

3. The defendant should not be compelled to account to the plaintiffs for any part of the proceeds of the sale of the stock of the Seneca Coal Company to the Lehigh Valley Railroad Company.

4. The plaintiffs, as stockholders, have no right to maintain their bill, there being no evidence or averment that the officers of the company were ever requested to bring suits or refused to do so.

5. The plaintiffs' bill should be dismissed and the costs should be paid by the plaintiffs.

Certain requests for findings of fact and conclusions of law have been presented by counsel for the plaintiffs and the defendant respectively, which we dispose of as follows:

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT.

1. In January or February, 1901, defendant knew that the Lehigh Valley wanted to purchase the Old Forge, Newton and Girard properties, and, on request of President Walter, made an offer to sell for eight hundred and fifty thousand dollars.

Answer: Affirmed.

2. In pursuance of said offer an examination of the Old Forge and Newton properties was made by the Lehigh Valley Coal Company and a report thereon made by its superintendent, W. A. Lathrop, to Alfred Walter, its president, on February 14, 1901, in which he valued the Girard property at sixty-five thousand dollars.

Answer: Affirmed.

3. In May, 1901, a further report was made by Lathrop, superintendent, to Walter, president of the Lehigh Valley Coal Company, changing his valuation of the Girard from sixty-five thousand dollars to forty thousand dollars, after an examination of the property.

Answer: Affirmed.

4. In June, 1901, the capital stock of the Seneca Coal Company was sold to the Lehigh Valley Coal Company for one million dollars. By this purchase the Lehigh Valley Company acquired the Girard, Old Forge and Newton properties, and nothing else.

Answer: Affirmed.

5. In April, 1901, the property of the Girard Coal Company was

sold to the Seneca Coal Company for about two thousand and twenty dollars on two executions issued, one on a judgment in favor of E. L. Fuller & Company, in a suit on a note dated January 23, 1901, from the Girard Coal Company to E. L. Fuller & Company; summons issued February 1, 1901, judgment by default March 16, 1901, on which execution issued April 5, 1901.

Answer: Affirmed.

6. At the date of said judgments and at the date of said sale E. L. Fuller was the president of the Girard Coal Company and the owner of a majority of the capital stock of the same, and was the president of the Seneca Coal Company and the owner of all the shares of its stock except enough to qualify the requisite number of directors, who were (besides himself) his son, his clerk and his superintendent.

Answer: Affirmed.

7. The property of the Old Forge Coal Mining Company was sold to the Seneca Coal Company by deed dated 26th February, 1901, for twenty-five thousand dollars, and at the time of said sale the defendant was the president of both companies and the owner of all the stock of the Seneca, except enough shares to qualify directors, as aforesaid.

Answer: Affirmed.

8. The property of the Newton Coal Mining Company was sold to the Seneca Coal Company at Sheriff's sale for a sum between twenty and thirty thousand dollars, and at the time of said sale E. L. Fuller was the president of both companies and the owner of the stock of the Seneca Coal Company as aforesaid.

Answer: Affirmed.

9. There was no return of the sale of the Girard Coal Company to the Seneca Coal Company by the Sheriff of Northumberland County until ——— and no deed in evidence.

Answer: Affirmed. The return of sale was made some time between February 5, 1904, and December 30, 1904, the exact time is not shown by the evidence.

10. The plaintiff had no notice of any meeting of the board of directors of the Girard Coal Company authorizing the note to E. L. Fuller & Company on which the judgment was founded that the said

sale was based on, although a director in the company at the date of the note.

Answer: Affirmed.

11. The plaintiff had no knowledge of the judgment confessed to E. L. Fuller by the Girard Coal Company, although a stockholder at the date of said judgment.

Answer: Affirmed.

12. The plaintiff had no knowledge of the sale of the Girard property to the Seneca Coal Company until after the sale of the Seneca Coal Company stock to the Lehigh Valley.

Answer: Affirmed.

13. The plaintiff has never received any of the proceeds from the sale of the property of the Girard Coal Company to the Lehigh Valley Coal Company through the purchase of the capital stock by the Lehigh Valley Company from the Seneca Coal Company.

Answer: Affirmed.

14. The Seneca Coal Company never did any mining nor owned any mining property from the time of its incorporation until it acquired the property of the Newton, Old Forge and Girard companies.

Answer: Affirmed.

15. One month before the sale of the Girard property to the Seneca Coal Company the Girard Coal Company expended from \$12,000 to \$14,000 in remodelling its breaker.

Answer: Affirmed.

16. The net loss from the entire business carried on by the Girard Coal Company to the date of sale to the Seneca, after deducting betterments, was \$21,314.46.

Answer: Affirmed.

17. The Seneca Coal Company acquired the Newton property for a sum between twenty-five and thirty thousand dollars, the Old Forge property for \$25,000, and the Girard property for \$2,020, and sold out to the Lehigh Valley Coal Company two months after the last purchase for one million dollars.

Answer: Affirmed.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW.

1. The president of a corporation, who purchases the property of the corporation at a public sale, holds it as a trustee for its stockholders.

Answer: Affirmed as a general legal proposition.

2. The president of a corporation, who is also a director and the majority owner of its stock, who purchases the property of the corporation at a public sale procured by himself, holds the property thus purchased as a trustee for a minority stockholder, and the sale is voidable by the *cesti que trust*.

Answer: Refused. This is not the law in all cases.

3. The president of a corporation, who purchases the property of the corporation at a public sale procured by himself, and within three months thereafter sells it at a profit, must account to his fellow-stockholders for their respective shares of such profit.

Answer: Refused. This is not necessarily so.

4. If a president of a corporation has any knowledge of facts that would give the property of the corporation a possible prospective value beyond its apparent value, he is bound to communicate such knowledge to his fellow-stockholders in case he procures a sale of the property to himself.

Answer: Affirmed.

5. If, with such knowledge uncommunicated to his fellow-stockholders, he becomes a purchaser of the corporate property at a sale, whether public or private, he holds the same as a trustee for his fellow-stockholders, and if he thereafter sells the property at a profit he is bound to account to them for such profit.

Answer: Affirmed.

6. The purchase by the Seneca Coal Company of the property of the Girard Coal Company at the Sheriff's sale in April, 1901, under the circumstances of this case, was equivalent to a purchase by the defendant of such property.

Answer: Affirmed.

7. The defendant in this case, being the president of the Girard Coal Company and the owner of a majority of its stock, and being the president of the Seneca Coal Company and the owner of all its stock except a few shares necessary to qualify directors, at the time of the

sale of the property of the Girard Coal Company to the Seneca Coal Company, held such property after the sale as a trustee for his fellow-stockholders, and having sold the property at a profit, must account to them for their share of the profit.

Answer: Refused.

8. Where a prima facie right to an accounting is shown, the defense that there will be no balance due plaintiff is not sufficient to prevent an accounting.

Answer: Affirmed.

9. Under all the evidence in the case the plaintiff is entitled to a decree for an accounting.

Answer: Refused.

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT.

1. On the 23d day of January, 1901, the Girard Coal Company was indebted to E. L. Fuller & Company in the sum of \$38,000 for borrowed money, together with the sum of \$2,961.17, interest on said amount up to the said 23d day of January, 1901, and at a meeting of the directors of the Girard Coal Company, held on the said date, it was directed that a demand note be given the said E. L. Fuller & Company for the said sum with interest.

Answer: Affirmed.

2. At the time this meeting was held, John B. Law, the plaintiff, was a director of the Girard Coal Company, and notice was sent to him of the said special meeting, and said notice stated that the object and purpose of the meeting was to authorize the giving of a demand note to E. L. Fuller & Company for the amount of said indebtedness.

Answer: Refused.

3. Suit was brought upon the demand note so given in the Court of Common Pleas of Northumberland County, to No. 1, May Term, 1901. This suit was brought February 1, 1901, and on February 2, 1901, the plaintiff's statement was filed; the summons and statement were served February 11, 1901; judgment was entered in the case on the 16th day of March, 1901, for the sum of \$41,322.99, and on the same day that judgment was entered execution was issued, and the property of the Girard Coal Company was levied upon and the same was sold on the 6th day of April, 1901, to the Seneca Coal Company.

Answer: Affirmed.

4. On the 5th day of April, 1901, the Girard Coal Company was indebted to E. L. Fuller for money advanced by said Fuller to said company, and interest on the same, in the sum of \$13,090.33, and on said 5th day of April, 1901, a judgment note, signed by the officers of the Girard Coal Company, in favor of said E. L. Fuller, was entered in the Court of Common Pleas of Northumberland County, and an execution issued thereon, which execution was in the hands of the sheriff at the time of the sheriff's sale of the property of the Girard Coal Company by the said sheriff on the 6th day of April, 1901.

Answer: Affirmed, excepting the date of the note which should be April 2, 1901.

5. The property of the Girard Coal Company was sold by the Sheriff on April 6, 1901, consisting of a leasehold estate of about one hundred and seventy-five acres of land, situated in the township of Mt. Carmel, Northumberland County, Pennsylvania; said lease being from the widow and children of Henry Saylor, deceased, to the Girard Coal Company, dated November 23, 1895, and the term of said lease commencing on January 1, 1896, and extending for a period of fifteen years until December 31, 1910. In addition to the coal lease there was also a certain amount of personal property connected with the colliery upon the premises, consisting of engines and machinery and other equipment of the colliery property. It is provided in the coal lease above mentioned that the same could not be assigned or transferred without the written consent of the lessors.

Answer: Affirmed.

6. The Girard Coal Company had operated this property during the years 1896, 1897, 1898, 1899, 1900 and up to the time of the Sheriff's sale, April 6, 1901, and the result of such operation was a net loss of about twenty-one thousand dollars, after deducting from such losses all expenditures for construction and betterments.

Answer: Affirmed.

7. The debts actually owing by the Girard Coal Company to E. L. Fuller & Company and E. L. Fuller, on the date of said Sheriff's sale, April 6, 1901, were fully equal to the entire value of the Girard Coal Company's property at that time.

Answer: Affirmed.

8. There is no evidence in this case that before instituting this suit, the plaintiffs, or either of them, applied to the Girard Coal Company, through its directors, for redress of their alleged grievances, nor was the said company requested by the plaintiffs, or either of them, to take any steps in the Court of Common Pleas of Northumberland County to set aside or open the judgment; nor is there any evidence that the plaintiffs, or either of them, applied to the directors or officers of the Girard Coal Company to institute this bill.

Answer: Affirmed.

9. It appears from the evidence in this case that after the Sheriff's sale in Northumberland County, the Girard Coal Company was still indebted to E. L. Fuller & Company and E. L. Fuller in the sum of about sixty thousand dollars, and they were creditors of said company to that amount.

Answer: Affirmed.

10. The note of the Girard Coal Company to E. L. Fuller & Company, dated the 23d of January, 1901, was for moneys advanced or obligations by E. L. Fuller & Company, as follows:

March 1, 1899.....	\$16,000
March 24, 1899.....	4,000
September 27, 1899.....	5,000
June 27, 1900.....	5,000
September 4, 1900.....	3,000
September 26, 1900.....	3,000
October 1, 1900.....	2,000

Making in all.....\$38,000

Answer: Affirmed.

11. The note of the Girard Coal Company to E. L. Fuller & Company was dated January 23, 1901.

Answer: Affirmed.

12. The negotiations between E. L. Fuller, or the Seneca Coal Company, with the Lehigh Valley Coal Company, took place in the month of February, 1901, and terminated at that time without a sale of the property.

Answer: Affirmed.

13. Under the evidence in this case the negotiation that resulted

in the sale of the stock of the Seneca Coal Company to the Lehigh Valley Coal Company took place in the month of June, 1901, and there were no negotiations pending between E. L. Fuller, or the Seneca Coal Company, and the Lehigh Valley Coal Company between the month of February, 1901, and the month of June, 1901.

Answer: Affirmed.

14. The property of the Girard Coal Company was sold by virtue of an execution issued out of the Court of Common Pleas of Northumberland County at the suit of E. L. Fuller & Company and E. L. Fuller, on the 6th day of April, 1901.

Answer: Affirmed.

15. At the time of said sale no negotiations were pending for the sale of the property between E. L. Fuller, or the Seneca Coal Company, and the Lehigh Valley Coal Company, nor were any in contemplation under the evidence in this case.

Answer: Affirmed.

16. There is no evidence in this case that John B. Law from the time he left the employ of the Girard Coal Company as superintendent, on the 1st of November, 1899, took any steps whatever on his own part to acquaint himself with the indebtedness or other affairs of said company.

Answer: Affirmed.

17. No fraud upon the plaintiff has been established in this case.

Answer: Affirmed.

DEFENDANT'S REQUESTS FOR FINDINGS OF LAW.

1. A director or officer of a corporation has the right to become a creditor of the corporation if the necessities of the case require it. He may advance money to meet the needs of the corporation, and if he does so, he has the same rights as other creditors. He has the right to secure a judgment for the amount of his indebtedness, and to take the corporate property in execution for the payment of such judgment, and if it becomes necessary, in order to protect his judgment, for him to bid upon the property and become the owner of it, he has the right to do so.

Answer: Affirmed.

2. Under the evidence in this case there was no trust relation between E. L. Fuller and the plaintiffs in this case at the time he sold the stock of the Seneca Coal Company to the Lehigh Valley Coal Company.

Answer: Affirmed.

3. Under the pleadings and evidence in this case the plaintiffs have no right of action as stockholders against the defendant.

Answer: Affirmed.

4. The facts developed and shown upon the trial of this case do not constitute constructive fraud or a fraud in law upon the plaintiffs.

Answer: Affirmed.

5. A person stands in a fiduciary relation to another when he has rights and powers which he is bound to exercise for the benefit of that other person.

Answer: Affirmed.

6. In prosecuting the claim of E. L. Fuller & Company and E. L. Fuller, against the Girard Coal Company to judgments, and the purchase of the property upon executions issued upon said judgments by the Seneca Coal Company, the defendant in this case held no fiduciary relation to John B. Law or Alexander Law so as to make him accountable to them as prayed for in this case.

Answer: Affirmed.

7. The purchase of the property by the Seneca Coal Company at Sheriff's sale passed a good title to the Seneca Coal Company, and under the evidence in this case, neither the Seneca Coal Company nor E. L. Fuller, its principal stockholder, are accountable to the plaintiffs for any part of the proceeds of the sale of the stock of the Seneca Coal Company to the Lehigh Valley Coal Company.

Answer: Affirmed.

8. Plaintiffs' bill should be dismissed.

Answer: Affirmed.

DISCUSSION.

The facts have been so fully stated in our findings and in our answers to the requests of the respective parties that it would serve no purpose to refer to them at any length here.

The plaintiffs, claiming to be stockholders of The Girard Coal Company, seek to have the defendant declared a trustee for them for their proportionate share of the value of the property of the company which was sold at Sheriff's sale to The Seneca Coal Company, a corporation, the capital stock of which was at the time practically all owned by the defendant, upon judgments obtained by E. L. Fuller & Company, a co-partnership of which the defendant was a member, and E. L. Fuller while he was the owner of a majority of the stock of The Girard Company, and was its president; which property with other properties were subsequently sold to The Lehigh Valley Railroad Company for one million dollars.

The plaintiffs base their claim for an account upon the general principle of law that officers and directors of a corporation are trustees for its stockholders and are forbidden in equity to acquire any interest hostile to the interest of the stockholders, and that whenever any such officer or director purchases the property of the corporation he takes it as a trustee for the stockholders; while on the part of the defendant it is contended that under the facts of this case the rule does not apply.

While it is true that generally speaking a director of a corporation cannot acquire the property of the company either at private or public sale to the prejudice of a stockholder, yet there are exceptions to this general rule. He may loan money to the company and take security for it, and he may enforce such security in the same manner as any other creditor if he acts in entire good faith. The principle is stated in 10 Cyc. 812, and sustained by many cases cited in the notes, as follows: "The only just and practicable doctrine is that the director of a corporation may advance money to it, may become its creditor, may take from it a mortgage or other security, and may enforce the same like any other creditor, but always subject to severe scrutiny, and under the obligation of acting in the utmost good faith." In *Oil Co. vs. Marbury*, 91 U. S., 587, the principle is laid down that while a director of a joint stock company occupies a fiduciary relation where his dealings with the subject matter of his trust and with the company are viewed with jealousy by the courts and may be set aside on slight grounds, yet one director among several might loan money to the corporation when the money is needed and the transaction is open and otherwise free from blame, and might buy at a sale under a mortgage given to him by the

company to secure the money loaned, if the sale was a fair one. This principle is recognized as the law in Pennsylvania as will be seen by reference to the opinion of Mr. Justice Dean in *Mueller vs. Fire Clay Co.*, 183 Pa., 460, in which he quotes from the opinion of Mr. Justice Miller the principle just stated as a proper statement of the law, and who thus states the rule: "The true interpretation of the rule, as shown by our own cases and the weight of authority in the United States is, that the burden is on the officers having both the power and preference to show that the contract was fair under all the circumstances." We find no cases in conflict with these principles of law, nor are there any referred to in the brief furnished us by the plaintiffs' counsel. The principle case upon which they rely is *Aultman's Appeal*, 98 Pa., 505. There is nothing in that case which is in conflict with the principles stated. It is authority for the general principle that a stockholder of a corporation cannot buy the corporate property without being held to account as a trustee for the other stockholders, but does not touch upon the question of the right of a director to advance moneys to a corporation and take and enforce security for it.

The question, therefore, is, as far as the merits are concerned, does the defendant, under the facts of the case, come within the general rule which would constitute him a trustee for the other stockholders, or does he come within the exception to it, which allows a director to advance moneys to a corporation, take and enforce security for it, and at a judicial sale of the company's property purchase it for his own benefit.

The Girard Coal Company, the sale of whose property constitutes the subject matter of the controversy, was operated at a loss from the time it first began business up to the time of the sale of its property to The Seneca Coal Company, which, as by reference to our findings will appear, we treat as a sale to the defendant. John B. Law was its manager and superintendent up to November 1, 1899, when he was removed, and under his management it lost money; and from that time until its property was sold at Sheriff's sale in April, 1901, under the management of his successor it continued to lose money; so that from the time it began to operate until it ceased, it had lost, exclusive of all expenditures for equipment and betterments, upwards of \$21,000. On the first of March, 1899, it owed the Old Forge Coal Company \$16,000,

which was paid on that date by the firm of E. L. Fuller & Company, and the debt transferred to them. This was while Mr. Law was the manager and had access to the books of the company, and who was a member of the firm of E. L. Fuller & Company at that time. This firm advanced moneys to it from time to time until on October 1, 1900, it owed them \$38,000. While it does not appear that Mr. Law knew of these advances, yet, as a member of the firm of E. L. Fuller & Company up to June 25, 1900, when he assigned his interest, he was in a position to know of them if he saw fit to inform himself, and as a stockholder and director of the Girard Company he was in a position to keep himself informed with reference to its affairs. There is no evidence that he was misled in any way or deceived as to the transactions between E. L. Fuller & Company and the Girard Company, or that he ever was denied any information. The meeting of the directors of the Girard company was called by E. L. Fuller as the president, "for the purpose of authorizing the treasurer to give the company's note to E. L. Fuller & Company for money borrowed from them during the last two years, viz.: \$38,000 and interest." A notice of this meeting was prepared in the office of the company to be sent to Mr. Law, but whether mailed or not it did not reach him and he had no notice of the meeting. If this notice was served upon him or if it had reached him through the mail he could certainly not deny the fairness of the transaction by which the property was sold. The validity of the debt is not questioned nor is there any suggestion that the loans were not made in good faith to supply the needs of the company. We cannot see how the fact of the notice not reaching Mr. Law can affect Mr. Fuller. It was not his duty as president to personally send out the notice, and there is no evidence or intimation that he was concerned in any way in the failure of the notice to reach Mr. Law, or that he knew that Mr. Law had not had notice. In addition to the indebtedness of the company to E. L. Fuller & Company of \$38,000, which, with interest at the time of the sale, amounted to upwards of \$41,322.99, which was the amount of the judgment entered against it on March 16, 1901, it owed the defendant personally the sum of \$13,090.33, which he had advanced to it from time to time, and for which a judgment note had been given him. The validity of this indebtedness is not questioned, nor is there any evidence to call in question the good faith of the defendant in making the loans.

In both it owned at the time its property was sold upwards of \$54,000, practically all its property was worth. It is true its value became much higher shortly after the sale to The Lehigh Valley Company, but that was due to the general advance in the price of all coal properties in the anthracite regions at about that time, and we must view the conditions as they existed at the time of the transaction by which the defendant became the owner of the property. It cannot be fairly found as a fact, in view of the uncontradicted evidence, that the property of the Girard company formed any part of the \$1,000,000 consideration for the sale of the Old Forge, Newton and Girard properties, in excess of \$40,000, which was the estimate placed upon it by the representative of the purchaser, after an examination by experts; which sum was much less than the amount of its indebtedness.

Under these circumstances and all of the facts of the case we cannot see that the defendant was guilty of any dishonest conduct or that he acted in bad faith. It is true that there was a rather abrupt change of conduct on the part of the defendant when he ceased advancing moneys to the company and began to enforce collection of his claims for which he and the firm of which he was a member had already loaned, apparently with a view of combining the three properties, but, as we understand the law, that fact would not render the transaction a dishonest one. He had the undoubted right to cease advancing moneys at any time to take legitimate legal action to collect what was already due him, either individually or as a member of a firm, and in the absence of any perfidious conduct on his part in doing so he had the right under the law to become the purchaser of the company's property.

Having found that on the merits the plaintiffs have failed to make out a case, it is, perhaps, not necessary to discuss the technical objections that are interposed against them. We will refer to one of them however. It is that the plaintiffs as stockholders cannot maintain their suit in the absence of an averment in the bill and proof of the fact that they made every reasonable effort to have the action brought by the Girard Coal Company itself. There is neither averment nor proof that there was any effort whatever made to induce the directors to institute any proceedings against the defendant. The law upon this question appears to be clear. In *Hawes vs. Oakland*, 104 U. S., 450, it is stated by the Supreme Court of the United States as follows: "Before a

shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances." Our own Supreme court in a per curiam opinion, in *Holten vs. Ry. Co.*, 138 Pa., 115, makes use of this language: "The bill was filed by Noble Holten, as a stockholder, to enforce the rights of the railway company. It is settled law that such suit must be brought by and in the name of the corporation; or, if brought by a shareholder, the bill must contain an averment of a demand by the shareholder upon the corporation to bring suit, and a refusal to do so. This is familiar law, and does not need the citation of authority." And again, by Mr. Justice Mitchell, in *Wolf vs. R. R. Co.*, 195 Pa., 94, is the rule stated fully and to the same effect. He said: "The first matter for consideration is the status of the plaintiff to maintain such a bill. It is a bill to assert rights of the corporation, and therefore must ordinarily be brought by the corporation itself. The right of an individual stockholder to act for the corporation is exceptional and only arises on a clear showing of special circumstances, among which inability or unwillingness of the corporation itself, demand upon the regular corporate management, and refusal to act are imperative requisites. And the refusal by the corporate management must appear affirmatively to be a disregard of duty and not an error of judgment, a non-performance of a manifest official obligation, amounting to a breach of trust: *Beach on Private Corporations*, sec. 878. There must be averred and proved an actual application to the directors, and refusal by them to bring suit or to allow plaintiff to do so in the corporate name, and where misconduct of the directors themselves is alleged, the bill must show an effort to secure plaintiff's rights through meetings of the corporation: *Beach*, secs. 882, 885. 'The shareholder should set forth in his bill the efforts that he has made to induce the corporation to act in the matter, should allege its refusal or failure to sue,' and 'facts showing that he has left undone nothing which in reason he might have done to prevail on the corporate management to bring the action:' *Taylor on Corporations*, secs. 138, 140. See also *Morawetz on Corporations*, secs. 241, 244.

The plaintiffs say in defense of their right to sue as stockholders, that inasmuch as the defendant was the president and owner of a large

majority of the stock of the company, a demand upon the company would have been useless. We cannot assume that such demand would be useless simply because the defendant owned a large majority of the stock. The charter of the company fixed the number of directors at four. Who they were at the time this bill was filed does not appear. On January 23, 1901, according to the minutes of the meeting held on that day, the directors present were E. L. Fuller, Frank T. Patterson and Percy C. Madeira. Whether Mr. Patterson and Mr. Madeira were still directors at the time the bill was filed or who the other two were, has not been shown. Proceedings of ouster were begun against the company by the Attorney General in the Dauphin County court, on March 14, 1902, but there was no decree of ouster until the 13th of November following, so we cannot see how that fact affects the question. In the absence of any proof of who the directors were about the time the bill was filed, and that they were mere representatives of the defendant, we do not think, in view of the authorities upon this subject, that the plaintiffs, as stockholders, can maintain the bill.

Let a decree be entered nisi in favor of the defendant and against the plaintiffs, and let notice be given by the prothonotary in accordance with the equity rules, that exceptions may be filed if desired.

In the Orphans' Court of Lackawanna County, No. 534, 1904.
In Re. Estate of Mary Ford, Deceased.

Where a sale is sought, for the payment of debts, the court should be satisfied that not only that the personal estate is insufficient for the payment of debts, but that the claims alleged to exist against the estate are bona fide debts, due and unpaid.

It is sufficient if the claimant establishes a prima facie claim.

Under the act of June 11, 1891, P. L. 287, providing that a party otherwise incompetent may testify as to relevant matter occurring in the lifetime of deceased, if another and competent witness has testified that said relevant matter occurred in his presence and in that of the surviving party the testimony of such competent witness must be adverse to the surviving party.

On account of the identity of interest of husband and wife, when one of them is incompetent to testify as witness, the other also is incompetent. Sec. 5, Clause (e), act of May 23, 1887, P. L. 158.

Mr. J. M. Walker, for executor.

Mr. Clarence Balentine, for claimant.

Mr. John P. Quinnan, for devisee.

Opinion by Sando, P. J., March 31, 1906.

Rule to show cause why order of court heretofore made allowing

sale of real estate of decedent for the payment of debts should not be revoked.

It was agreed by and between counsel representing the devisees under the will, the executor of the estate and the claimant, that the petition for order of sale for the payment of debts filed on behalf of the executor, the petition filed by the devisee to revoke the order of sale, and the replication, shall stand as petition, answer and replication, respectively, in this proceeding.

In the schedule of debts, consisting of eight items, exhibited at the time of making the order of sale, four were for the costs incidental to administration; one for service for drawing the last will and testament of the testatrix; one for insurance premiums, taxes and supplies paid for and furnished; one for medical attendance before and during last illness; and one for services rendered, suit pending in the Court of Common Pleas of Lackawanna County.

In the present case, the petitioner, objects to the proposed sale, and alleges that there is sufficient personalty to pay such of the scheduled debts of the testatrix as are actually due and payable.

Where a sale or mortgage is sought, for the payment of debts, under the Act of March 29, 1832, the Court should be satisfied that not only that the personal estate is insufficient for the payment of debts, but that the claims alleged to exist against the estate are bona fide debts, due and unpaid, and that the only means of payment is by a sale or mortgage of a portion of, or the entire real estate.

The creditor whose claim is resisted, claims compensation for professional services alleged to have been rendered to the testatrix in her lifetime, and for expenses alleged to have been incurred in connection with the rendering of said services.

All that is to be determined at this time is whether the claim is a prima facie one against the estate. If it is a claim, taking it with the undisputed claims, the personal property being insufficient, the order to sell for the payment of debts should stand. When the account is before the court for audit all parties in interest whether creditor, claimant, heir or devisee have had notice to appear, are actually or presumably in court, and then all questions affecting the distribution are raised and passed upon. At the audit of the account, the proceedings will be de

novo, and no decree which may now be made will prevent the petitioner from again resisting the demands of the creditor.

It is sufficient if the claimant establishes a *přima facie* claim and in the preliminary proceeding the court will not enter upon an investigation of these questions which should be passed upon at the audit of the account. Then all the parties will have their day in court.

There is no evidence of any special contract in relation to the services performed, or the compensation to be paid therefor. The only contract relation between the claimant and the testatrix was such as ordinarily exists between physician and patient, and hence, it was ended with the death of the testatrix, and might have been terminated before that event, at the pleasure of either party.

The claimant was offered as a witness in his own behalf. His competency being objected to, it was contended that he was competent under the Act of June 11, 1891, P. L. 287, by which a surviving party is made competent to testify to any relevant matter which occurred before the death of the other party, if such matter occurred between the party himself and a person who is living and who testifies against him at the trial, or "if such relevant matter occurred in the presence or hearing of such other living and competent person."

The Act palpably means that the testimony of this competent witness is adverse to the surviving party. Here the witnesses called, were by the claimant. The claimant's incompetency to testify under the facts disclosed, was not removed by the act. The claimant under this Act could testify to any relevant matter occurring before the death of Mary Ford only if such matter occurred between himself and another person or in the presence or hearing of another person who had been called and testified to such matter against the claimant.

The inequality of the parties created by the death of one of them seals the lips of the other; but when the inequality has been removed by a living and competent witness who testifies against the surviving party to any relevant matter occurring in the lifetime of the deceased between the witness and the deceased or in the presence of the witness, the competency of the other and surviving party to the transaction is restored by the Act of 1891, to the extent of permitting him to protect himself against the testimony of his adversary's witness.

Under the Act of May 23, 1887, the claimant would not be com-

petent. He is, therefore, clearly excluded as a witness under the Act of 1887, and was not made competent to testify under the Act of 1891.

On account of the identity of interest of husband and wife, when one of them is incompetent to testify as a witness, the other also is incompetent: Sec. 5, par. (e.), Act of May 23, 1887, P. L. 158. Dr. Bower is not only the surviving or remaining party to the thing or contract in action, but he is a person whose interest is adverse to the decedent's right. His wife was not a party to the thing or contract in action, and was not rendered incompetent on that ground, but was she a person whose interest is adverse within the meaning of the Act of 1887? Can she be considered a competent witness, when upon the ground of interest her husband is incompetent?

The rule of exclusion is founded upon the two-fold consideration of interest and policy. If the husband must be excluded on account of interest, so also must his wife be excluded on account of her unity of interest with him. So closely connected in interest are they, that in equity, in controversies affecting the interests of either, the testimony of both is considered as the testimony of one person only: *Lower vs. Weaver* 73 Pa. 443.

We are of the opinion that Mrs. Bower is incompetent.

If the claim rested upon the testimony of Dr. Bower and his wife it could not be established. But it does not; there is competent evidence to establish the claim, with the testimony of Dr. Bower and his wife out of the case altogether.

The claimant, independent of his testimony and that of his wife, disputed as to competency, has by the testimony of witnesses, testifying without objection, established a *prima facie* claim, not for the full amount but sufficient to show a considerable indebtedness.

Mrs. Ida Howell, testified, that decedent was at the private hospital or home of the claimant from May 16, 1904, to September 1st, 1904, and John Harcher testified, that deceased was there from August till November 7th, 1904. The witness Coppinger, who conducts a private sanitarium, testified as to what would be a fair compensation for a patient taken to a doctor's home for treatment, suffering from chronic pulmonary consumption, a woman seventy-five years of age, confined continuously to her bed, furnishing her with board, lodging, nursing

and professional treatment. There was no objection to the testimony of the three above named witnesses.

The petitioner offered no evidence to rebut the competent proof offered by the claimant as to the validity of the claim, but confines himself merely to the allegations in his petition that the claim for medical services and medical attendance is absolutely unjust and unfounded.

In the schedule of indebtedness it is represented that Dr. Bower is a creditor to the extent of \$815. Without attempting fully to pass upon the merits of the claim, it is evident that the testimony fails to show that there is less than \$575 due from the estate to the claimant.

Now, March 31st, 1906, the petition, to revoke the order of sale for the payment of debts, is dismissed.

In the Court of Quarter Sessions of the Peace in and for the County of Lackawanna, No. 72, October Sessions, 1905.

RULE TO QUASH INDICTMENT.

Commonwealth vs. Alfred Harvey.

The Act of April 23, 1903, P. L. 268, relating to the use of automobiles on the public highways is unconstitutional because its title is misleading. Nothing is said in the body of the act about licensing any one other than the owner. The penalty prescribed is incurred through the owner's failure to procure the license. But so far as the title says anything on the subject it indicates a purpose to put the duty of getting a license only on the person of the operator and to attach the penalty to his default in that regard. There is a substantial variance between the title and the body of the act in that respect, and it brings Sec 6 within the prohibition of Sec. 3, Art. III, of the constitution, which requires that the subject matter of a statute shall be clearly expressed in its title.

Messrs. O'Brien, Martin & Fitzgerald, for plaintiff.

Mr. T. F. Wells, for defendant.

Opinion by Newcomb, A. L. J., May 14, 1906.

This indictment charges the defendant with a violation of the act of April 23, 1903, P. L. 268, relating to the use of automobiles on the public highways. The specific offence set out is the operation of an automobile on the streets of this city without first having procured a license therefor. He is described as the owner and as such is alleged to have violated the provision of the act requiring him to have such license. That provision is found in the sixth section, and is as follows: "No person shall be allowed to use or operate any such motor vehicle

upon any of the public highways aforesaid until the owner thereof shall have procured a license from one of the cities or counties of this commonwealth."

It is contended that the act is unconstitutional for two reasons: First, because its title is misleading, and, Second, because it doesn't operate uniformly on all persons and all vehicles or even all motor vehicles alike.

We are not convinced by the argument of the learned counsel that his second position is well founded. To doubt in such case is to decide in favor of the statute. Hence, in that particular we cannot say the act is invalid.

The first reason, however, is based upon a palpable constitutional defect. The section which defines the offence alleged in the indictment relates only to a license to be issued to the *owner*. Nothing is said there or elsewhere in the body of the act about licensing any one other than the owner. The penalty prescribed is incurred through the owner's failure to procure the license. But so far as the title says anything on the subject it indicates a purpose to put the duty of getting a license only on the person of the operator and to attach the penalty to his default in that regard. In our judgment there is a substantial variance between the title and the body of the act in that respect, and it brings section six within the prohibition of section three, Art. III, of the constitution which requires that the subject matter of a statute shall be clearly expressed in its title. This accords with the view expressed by Judge Walling in *Com. vs. Densmore*, 13 D. R., 639, and we feel no hesitation in saying that this section of the act upon which the indictment must stand or fall cannot be upheld. True, as was said by Judge Walling in the case referred to, the purpose of the legislature was wise and commendable for it aimed to secure the safety of the public in the use of the public highways. It is not unlikely that the intent was to require, not a personal license at all but, that the machine should be licensed, but, if so, the intent was inadequately expressed. And under well settled principles, especially applicable to penal legislation, we are not at liberty to travel outside the express words of the statute to determine its meaning: *U. S. vs. Wiltberger*, 5 Wheat. 76; *U. S. vs. Harris*, 177 U. S. 305.

"It is always unsafe to depart from the plain and literal meaning of words contained in legislative enactments, out of deference to some supposed intent or absence of intent which would prevent the application of words actually used to a given subject. Such practice is really substituting theories of a court which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the law-making power": *Pittsburg vs. Kalchthaler*, 114 Pa., 547; *Com. ex-rel. etc., vs. Fitler*, 147 Pa., 288.

For the reasons stated, the rule to show cause is made absolute and the indictment quashed.

In the Court of Common Pleas of Lackawanna County, No. 1205, September Term, 1903.

RULE FOR A NEW TRIAL.

William Qualey vs. The City of Scranton.

It is generally agreed that a traveler's previous knowledge of a defect in the highway whereby he is injured is not in itself sufficient, as a matter of law, to prevent his recovery on the ground of contributory negligence. It is not contributory negligence for one to pass over a dangerous bridge with knowledge of its unsafe condition, in the absence of distinct notice to him or to the public not to use it.

Messrs. C. P. O'Malley and M. J. & T. A. Donahoe, for plaintiff.

Mr. D. J. Davis, City Solicitor, for defendant.

Opinion by Kelly, A. L. J., May 14, 1906.

This case and the case of *John J. Coyne vs. The City of Scranton*, No. 1206, September Term, 1903, were tried together, and as the same reasons for a new trial are presented in both cases there is no need of a separate discussion of them.

The claim on the part of the plaintiffs was that on the afternoon of May 11, 1903, one E. H. Jordan undertook to drive the horse and carriage of John J. Coyne, the plaintiff in the other case, from the village of Minooka to the city of Scranton, for the purpose of getting the horse shod; that he invited Qualey to go with him and that Qualey accepted his invitation, and the two started towards Scranton, Jordan sitting on the left side of the carriage driving, while Qualey sat on the right side; that when they had gotten within the city lines, driving along Cedar avenue towards the central city, they stopped to let a trip

of mine cars pass on a branch railroad which crossed the street and ran to a near by colliery, and just after they started on again, and while passing a street car going in the opposite direction where there was barely room to pass, as Jordan turned the horse out from the car track slightly in an effort to pass safely, the left wheel of the buggy went into a deep rut in the highway with such force that Jordan was thrown out, and that the horse went on with Qualey in the carriage trying to stop him for some forty or fifty feet, when the horse and carriage and Qualey all went over a steep unguarded embankment at the edge of the driveway, causing serious bodily injury to Mr. Qualey and damage to the horse and carriage belonging to Mr. Coyne. The negligence complained of was the alleged failure of the city to maintain the street in question at that point in a fairly safe and passable condition for public travel, in that the ruts so deep as to be dangerous were suffered to remain there for some months, and the embankment along the side of the driveway was allowed to remain for some months unguarded, after the city had notice of the conditions there. On the part of the defendant it was claimed that the cause of the accident was the fright of the horse at the passing street car, while Qualey and not Jordan was driving, causing him to run away and go over the embankment.

There was evidence at the trial to sustain either contention, and it was submitted to the jury for their determination and verdicts for the plaintiff were rendered. The verdicts were not excessive under the evidence, and, therefore, they should not be disturbed unless there was error committed in the trial.

The reasons assigned raise but one question, viz., that binding instructions should have been given in favor of the defendant. After a careful examination of the evidence we are of the opinion that both cases were clearly for the jury. No fault is found either with our rulings or charge, and the only question pressed at the oral argument on this rule was that Jordan was guilty of contributory negligence in attempting to drive over the street in question when he knew of its dangerous condition. This is not the rule in cases of this character. "It is generally agreed that a traveller's previous knowledge of the defect in the highway whereby he is injured is not of itself sufficient, as a matter of law, to prevent his recovery on the ground of contributory negli-

gence": 15 Am. & Eng. Ency. of Law, 468. In *Humphreys vs. Armstrong County*, 56 Pa., 204, it was held that it was not contributory negligence for one to pass over a dangerous bridge with knowledge of its unsafe condition, in the absence of distinct notice to him or to the public not to use it. And in *Merriman vs. Phillipsburg*, 158 Pa., 78, the same principle is laid down. We submitted the question of Jordan's contributory negligence to the jury under all of the evidence in the case with the instruction that if they found he was guilty of contributory negligence the plaintiff, Coyne, whose agent he was, could not recover.

The rule for a new trial is discharged.

In the Court of Common Pleas of Lackawanna County, No. 333, May Term, 1905.

RULE TO TAKE OFF NON-SUIT.

Diamond Glass Co., vs. John H. Ladwig.

The plaintiff entered into a contract, in writing, with defendant to furnish the latter with two show cases and "set them up at defendant's store." The parts of the cases were received and placed by direction of defendant in a room of his store where unopened packages were kept, awaiting the coming of plaintiff's representative who was to set them up. The same night the store, including the parts, was destroyed by fire.

Plaintiff brought suit on the entire contract for the agreed price of the cases. Held: That "setting up" was a material part of the plaintiff's contract and it could only recover upon proof that the contract had been performed in that respect, unless performance had been waived or prevented by the unauthorized act of the defendant.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. Watson, Diehl & Kemmerer, for defendant.

Opinion by Newcomb, A. L. J., May 7, 1906.

This is a second suit upon an entire contract for the agreed price of two show cases. The contract was in writing, being in form an order signed by defendant containing detailed specifications according to which the cases were to be made, and requiring the plaintiff to set them up at defendant's store, with a term of credit dating from that time. It further stipulated that there was "no condition or understanding relative to the above order that is not specified therein." In both instances the plaintiff averred full performance.

The proof was that when the parts were completed at the factory

in Cleveland they were shipped to this city to the order of defendant in several packages on the 22d and 23d of October, 1903; that about the last of that month the plaintiff's man was here by its direction to set up the cases. He left town on October 31st and came back on the night of November 3d. The goods had arrived that day and were hauled to the store not by any special order of the defendant but by order of a drayman having a general contract with him to deliver all shipments found in his name at any of the freight depots. When advised of the delivery the defendant directed that the packages be taken to a room on the top floor of his store where unopened packages were kept. The same night the store and contents, including these packages, were destroyed by fire.

In refusing to take off the first non-suit we said in substance that under the declaration "setting up" was a material part of the plaintiff's contract and it could only recover upon proof that the contract had been performed in that respect, unless performance had been waived or prevented by the unauthorized act of the defendant, and that the evidence failed to show either waiver or such unauthorized act.

In this instance the plaintiff went to trial upon the same declaration. It seeks to escape the effect of the former ruling on three different grounds. They seem to us quite incompatible with each other. First it is contended that setting up was not essential to the passing of title to the property; and, therefore, the plaintiff is entitled to recover the contract price less what it would have cost defendant to have the cases set up. This controverts our construction of the contract on a fundamental ground, and we see no reason to say there was error in that. But it is not easy to reconcile that contention with the second proposition which is that the nature of the goods and the special skill and care required in handling them were such that it was peculiarly necessary that they should be removed from the depot only by the skilled operative of the plaintiff who was sent here for the express purpose of setting them up, and hence, the act of the defendant in receiving them at his store a few hours before the arrival of the operative was an unauthorized act which prevented performance on plaintiff's part. This would necessarily seem to admit that setting up was a material part of plaintiff's contract for one thing, and for another, negatives the theory that defendant became liable because title passed by force of the ship-

ment to his order and the reception of the packages in his store.

Finally it was sought to reform the contract by adding an express stipulation that the defendant should not remove the goods from the freight station nor in any wise intermeddle with them, which was omitted from the writing by mistake and inadvertence, thus charging him with an unwarranted interference with the plaintiff's property.

This motion was made only on the trial of the second action and then not till after a motion for non-suit. If allowed in all probability it would have resulted in a continuance of the cause, thus involving a third trial. Considering the nature of the transaction and the incident of the fire this omission ought to have been thought of at a much earlier date in the litigation. We think the motion could have been properly refused on the ground of laches. But there were other reasons for its refusal. The petition merely avers that the alleged stipulation was omitted "by mistake and inadvertence." What was the mistake? Was it as to some matter of law? Whose mistake was it, that of the salesman, or of both parties? The petition is inadequate in these particulars to sustain the motion.

Again, it is uncertain whether the plaintiff under the proposed amendment claims to recover the contract price or damages for the loss of the cases resulting from the defendant's breach. For leave is asked to add to the declaration this averment: "And as a result of said breach of contract and of duty on his part the goods were destroyed on said November 3, 1903, shortly after they had been placed in his said store. Plaintiff avers by reason of said breach of contract the defendant waived and prevented the plaintiff from taking said show cases from the station and setting them up, and that the said goods were worth \$375, and that by reason of the acts of the defendant it has lost the same. Plaintiff avers that by reason of the premises it is entitled to recover the sum of \$375 with interest."

This charges a breach of contract sounding in tort, and sets up as the measure of damages the value of the goods which plaintiff lost by defendant's misconduct. Essentially this is case, not assumpsit, and we can see no error in the refusal of an amendment so objectionable for duplicity.

Nothing remains to be considered but the soundness of plaintiff's

second position as to an implied interference with the plaintiff arising from the voluntary reception of the packages by the defendant when brought to his store by the cartman. It is admitted that the only thing he could have done at that time would be to order them returned to the station. But bearing in mind that they were shipped to his order we are unable to see upon what theory he was bound to do that or how he exceeded his rights in allowing them to be deposited in his store. It isn't claimed that the fire was anything other than a mere casualty or that the defendant had any occasion to anticipate it. He is not charged with negligently exposing the property to the risk of fire. The event was unfortunate, but we can see no more ground for recovery on the contract than there would have been had the goods been destroyed by fire while in the freight station.

The rule to take off non-suit is discharged.

In the Court of Common Pleas of Lackawanna County, No. 414, January Term, 1904.

RULE TO TAKE OFF NON-SUIT.

Eagle Hose Company vs. Priceburg Electric Light Co.

A non-suit is properly directed when the proximate cause of an injury was due to a casualty which the defendant was not reasonably bound to foresee.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. Levy, Thayer & Lynch, for defendant.

Opinion by Newcomb, A. L. J., May 7, 1906.

A fire broke out in a frame building in the village of Priceburg about forty feet diagonally across the street from an electric light maintained by the defendant company. The lamp was suspended over the street from a mast arm fixed to the pole. It was held in place by a hemp rope running through a pulley attached to the arm. The hose company responded to the fire alarm and for its purposes it was necessary to drive its wagon past the pole, perhaps a hundred feet, where it was turned and driven back. Just as the team approached the light on its return the lamp fell to the ground with the wires attached, and, without fault on the driver's part, one of the horses stepped on the wire and was instantly killed by the electric shock. The cause of the accident to the lamp was the intensity of the heat from the fire which in some way un-

noticed had become communicated to the rope and burned it off. The rope ran along the mast arm to the pole and thence down the pole to a point within reach from the ground where it was made fast to a cleat.

While negligence in two particulars was charged, plaintiff sought to sustain only the averment of negligent construction in that there was no device on the pulley known as a safety clutch, the office of which is to detach the weight of the lamp when drawn up to the mast and attach it to the pulley. Its theory was that had such device been used the lamp would not have fallen when the rope was severed.

The non-suit was directed upon the ground that the proximate cause of the injury was the burning of the rope due to a casualty which the defendant was not reasonably bound to foresee.

The plaintiff assumed the burden of proving that in and prior to the year 1903, when the accident occurred, such devices had come into use. As to the extent of their use in this vicinity the evidence was somewhat indefinite. It did appear, however, that in design and character they were various and only one of the then known designs was calculated to afford the rope any protection from fire at the point between the cluth and the lamp. This was a clutch having a hood which served as a shield. The evidence failed to show either that the use of this kind of clutch was anything more than experimental in this locality at the time in question, or at what point the rope was burned off.

Hence we fail to see how, in any view of the evidence, the specific allegation of negligence relied upon is made out, and the rule to take off the non-suit is discharged.

In the Court of Quarter Sessions of Lackawanna County, No. 29 February Sessions, 1906.

INDICTMENT: FORGERY.

RULE TO QUASH.

Commonwealth vs. T. Mitchell.

An instrument void on its face because meaningless, indefinite, or lacking a payee is not a subject of forgery.

Mr. W. R. Lewis, District Attorney, for plaintiff.

Messrs. John F. Scragg and W. W. Baylor, for defendant.

Opinion by Kelly, A. L. J., May 14, 1906.

The defendant is indicted for the forgery of the following paper:

"Advertising Contract.

As settlement in full for our insertion in the 1905 Edition of this book The undersigned firm agrees to pay *Forty* Dollars, The same appearing ¼ Page and Heading as ordered therein on Publication.

Verbal agreements not recognized.

Am Handbook & Rf Guide

\$40.00

Firm Name The Title Guaranty & Trust
Per Company of Scranton, Penna.

Book not included in this charge.

Address by *Grant L. Bell,*
Treasurer."

Scranton, Feb. 1905.

The indictment contains all the usual and formal averments, and charges that the paper which it designates as an "advertising contract," is to the prejudice of The Title Guaranty and Trust Company of Scranton, Pennsylvania. The question on this rule to quash is: Does the indictment charge the crime of forgery?

Forgery is the false making or materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficiency, or the foundation of legal liability: 1 Bishop Crim. Law, 7th Ed., sec. 572. To constitute the crime it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud: 19 Cyc. 1373. It must be of some apparent legal efficacy and one which if genuine might injure another, and, therefore, an instrument void on its face because meaningless, indefinite, or lacking a payee is not the subject of forgery: Ibid 1379-80.

Applying these tests to the writing set out in the indictment no forgery is charged. The instrument is entirely meaningless. It would not sustain an action in favor of anyone standing by itself. It does not mention what is to be inserted in a book or what book the insertion is to appear in or who is to cause the insertion to appear, or who is to receive the forty dollars mentioned. "Am Handbook & Rf Guide" without explanation conveys no meaning at all. In fact the paper is a mere incoherent jumble of words and figures.

In the cases of *People vs. Parker*, 114 Mich. 442, and *People vs. Drayton*, 168 N. Y., 10, we find papers very similar to this one set out in indictments for forgery, in both of which it was held that the indictments did not charge a crime in the absence of any averment of extrinsic facts or matter *aliunde* to show that the instrument, if genuine, would be operative. Of course if the first count which charges forgery is bad the second count charging uttering must also be bad.

The rule to quash is made absolute.

In the Court of Commn Pleas of Lackawanna County, No. 3, May Term, 1906.

IN EQUITY.

MOTION TO CONTINUE PRELIMINARY INJUNCTION.

Charles E. Chittenden et al. vs. Joseph Reddington.

Where the whole structure is substantially carried forward it is not a bay window nor can it be made into one merely by inserting or opening windows in its walls.

A bay window is distinctively and essentially a window projected outwards beyond the front line or place of a building, on a square, polygonal or circular plan, the effect of which is to form a bay or recess in the room from which it projects or opens. If it is supported or carried on corbels or brackets, it is called an oriel; if circular in plan, it is a bow window; if it is straight sided and rests upon the ground it is a bay window proper; and if it extends up over more than one story, it is called a double or triple bay according to the number of stories to which it reaches.

Messrs. Vosburg & Dawson, for plaintiffs.

Mr. Clarence Balentine, for defendant.

Opinion by Newcomb, A. L. J., May 22, 1906.

This is a proceeding to restrain the defendant from erecting a building upon any part of what is locally known as the "ten foot reservation" on his lot at No. 1009 Mulberry street in this city. The plaintiffs, Mr. Chittenden and Mr. Higgins, own the lots adjoining the defendant on the east and west respectively. The other plaintiff, Mr. Brooks, owns a lot on the opposite side of the street. The several lots of the plaintiffs are improved with dwelling houses, occupied by the owners with their families. The defendant's lot is also improved with a two-story frame dwelling house in course of alteration so as to enlarge it and convert it into an apartment house. The controversy arises out of

a right or privilege common to all the titles derived from the Lackawanna Iron & Coal Company, under which these parties, as well as all other owners on the central city streets, have title to their lands. The privilege is coupled with a restriction and in form is as follows: "With the privilege of using ten feet in front of the front line of said lot upon Mulberry street for yard, vault, porch, piazza, cellar-way and bay window, but for no other purpose."

The history of this provision was the subject of interesting discussion in this court in *Com. ex. rel. Jermyn vs. Nelson*, 2 Lacka. Jur., 261 in 1894. This was a mandamus to compel the defendant as inspector of buildings to issue a permit which he had refused because in his judgment the plan involved the occupation of the ten feet in question on Spruce street by a building not within the terms of the privilege. It was claimed on the other hand that the proposed construction was a bay window. The court found as a matter of fact that it was a bay window, and held as a matter of law that such window could form a bay to a building as well as to a room. In a later case, *Vetter, et al., vs. Flaherty*, 4 Lacka. L. N., 175, in 1897, which was a motion for special injunction at the suit of adjoining owners to restrain defendant from extending his building upon the ten-foot strip on Penn avenue, this rule was modified and one materially different laid down which has become the settled rule of this court. We can add nothing to what was there said by Archbald, former president judge of the court, in an elaborate and instructive opinion covering the history and purpose of the provision in the deed giving rise to the controversy as well as the respective rights of all parties concerned as affected by the restriction. Hence, we refer to that case for a full discussion of the principles which are regarded as controlling the disposition of this motion.

The question there, as in this case, was whether a certain proposed construction was a bay window within the meaning of that term as used in the grant from the L. I. and C. Co. The learned judge defined the term as follows:

"A bay window in its broadest architectural significance constitutes a class of window structures of which an oriel window, a jut window, a bow window and a bay window proper are individual examples. It is distinctly and essentially a window projected outwards beyond the front line or face of a building, on a square, polygonal or circular plan,

the effect of which is to form a bay or recess in the room from which it projects or opens. If it is supported or carried on corbels or brackets it is called an oriel; if circular in plan it is a bow window; if it is straight-sided and rests upon the ground it is a bay window proper; and if it extends up over more than one story it is called a double or triple bay according to the number of stories to which it reaches. See Knight's Mechanical Dictionary, Vol. I, p. 252; Encyc. Brit., Vol. I, p. 460; Imperial Dictionary, tit. Bay window; Standard Dictionary, *ibid*; Encyclopædic Dictionary, *ibid*; Worcester's Unabridged Dictionary, *ibid*; Century Dictionary, *ibid*; see also the evidence in the case.

"Where the whole structure is substantially carried forward it is not a bay window nor can it be made into one merely by inserting or opening windows in its walls."

As already noted, this definition has from that time been adhered to by this court as entirely satisfactory and consistent with the manifest objects which the clause in question was intended to secure. It only remains, therefore, to determine whether the structure complained of falls within that definition.

The evidence taken at the hearing, and a personal examination of the defendant's building so far as it has progressed, warrants the finding that his old building has been extended in the rear; a third story has been added; the front including the old piazza and piers has been removed, together with a considerable portion of the front cellar wall; the cellar has been excavated to extend under the new structure in front; new foundations have been built extending from front of old building in a straight line toward the street a distance of about twelve feet, and also under new front excepting a space of about seven feet at center which has been left open for steps. The new foundation extends outward six or seven inches from face of woodwork now in place suggesting the intention of facing new wood side walls, hereafter mentioned, with brick or stone. From the break in front foundation a passage or recess has been formed six feet eight inches wide enclosed by brick walls on either side, extending to top of second story, which is the proposed height of the structure complained of. Calling the inside line of the ten-foot "reservation" the building line, these brick walls extend toward the street about five and one-half feet beyond the building line, and are, therefore, to that extent on the "reservation." They

are solid to a point about seven feet back where openings have been left for a door of ordinary size on either side of recess or passageway. From that point the walls extend back about seven feet farther and there connect with face of another brick wall. With the exception of this recess which is as yet entirely open, the new front is entirely closed to top of stone-work, which is fairly heavy construction with cut stone, and is about five feet above grade at highest point. The front sills are on these walls, thus defining the outlines of the proposed front enclosure. So outlined each side of the central passage makes a separate section of the new front, each of which has a central face parallel with the street six feet wide as shown on plan, and a side face four feet wide turning back from either side of the central face at an angle of about eleven degrees. In this way an extension is formed of about nine inches from the exterior angles, making a total extension of the sections of about six and one-half feet beyond the building line. According to the building plans these faces are to be windows. The wooden side walls above referred to as extended are a continuation of the old side walls toward the street. They are of frame work covered with diagonal sheathing each having an opening for a window about three feet by six, and as already noted, are apparently intended to be veneered with brick or stone.

In our judgment this forms a case "where the whole structure is substantially carried forward" beyond defendant's building line. The mere opening of a passageway so as to divide the building front into two sections is of no more importance in determining its character than window openings would be. The only thing about the proposed construction to give a bay window effect is the nine inch extension formed on each section by the three faces above described rising from the front foundation, one of which parallels the street, the other two connecting it at an angle with the ends of the side walls. But the trouble with that is that the base of the bay thus formed would be upwards of five feet beyond the building line. The structure as planned is obnoxious to the rule stated in *Vetter vs. Flaherty*, and may be restrained at the suit of the plaintiffs as owners of lots on the same plot for the general benefit of which the restriction as to the use of the ten-foot strip exists.

The order for the writ was somewhat general and indefinite and should be made more specific, as follows: That the defendant, his con-

tractors, agents, servants and employes be enjoined from using the ten feet in front of the front line of his lot on Mulberry street in the city of Scranton, described in plaintiff's bill, for any purpose other than for a yard, vault, porch, piazza, cellarway or bay window, and particularly from erecting or constructing thereon the building proposed by him to be there built as shown by the plans in evidence at the hearing had in this case, and as outlined by the construction now upon the ground. As so modified the preliminary injunction is continued until the further order of the court.

In the Court of Quarter Sessions of Lackawanna, No. 360, December Sessions, 1905.

CASE STATED.

Commonwealth vs. George I. Griswold.

A person who simply goes about and takes orders for goods as the agent of a non-resident business house, and afterwards delivers them to the several purchasers and collects from them the prices at which they were sold does not violate an ordinance which provides that every person who enters in a transient business for the sale of any merchandise "from cars, platforms or transient warehouses, shall and must take out a license for the same from the city treasurer of said city."

Mr. D. J. Davis, City Solicitor, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Kelly, A. L. J., May 7, 1906.

The defendant was arrested upon the charge of violating an ordinance of the City of Scranton and was duly convicted before an alderman who sentenced him to pay a fine of one hundred and fifty dollars, pay the costs of prosecution, and in default of payment of fine and costs he was committed to the county jail for a period of thirty days. The specific charge was that the defendant "did, on or about the 16th day of October, 1905, enter into a transient business in the City of Scranton, for the sale of goods, wares and merchandise, without first having taken out a license so to do," thus violating the ordinance of the city known as File of Common Council No. 54, of the year 1901, approved the 24th day of March, 1902. An appeal to this court was allowed, upon defendant entering bail, and the facts have been agreed upon in a case stated.

The first section of the ordinance provides: "That hereafter every person, whether principal or agent, not engaged in permanent business

in the City of Scranton, entering into, beginning or desiring to begin a transient business in said City of Scranton, for the sale of any goods, wares or merchandise whatsoever, from cars, platforms or transient warehouses in the said city, whether the same shall be represented or held forth to be bankrupt, assignee, about to quit business, or of goods damaged by fire, water or otherwise, or by any attractive or conspicuous advertisement whatsoever, shall and must take out a license for the same from the city treasurer of said city." The second section provides for the amount to be paid for the license, its term, and exempts persons selling goods of their own raising or manufacture; and the third section fixes the penalty for violation.

The facts relied upon to establish the defendant's guilt are set out in the fourth, fifth, sixth and seventh paragraphs of the case stated, as follows:

"Fourth: The above named defendant, George I. Griswold, is a citizen of the State of Pennsylvania and of the United States, and at the time of the commencement of the prosecution of this case was and still is employed by the Citizens' Wholesale Supply Company, a foreign corporation, of the City of Columbus, in the State of Ohio; that the said defendant, in pursuit of his employment under said company, came to the City of Scranton, in the county of Lackawanna and State of Pennsylvania, on the 18th day of October, 1905, for the purpose of delivering certain goods for which he, the said defendant, as the agent of said company, had previously made contracts of sale, while the said goods were in the warehouse of the said company at Columbus aforesaid; that the said defendant went to the Delaware and Hudson Railroad freight station in the City of Scranton and took therefrom large packages of groceries and other articles of domestic use and consumption which had been shipped from Columbus, aforesaid, addressed and to be delivered to the said defendant; that the said defendant carried the goods aforesaid to a room at No. 1538 Dickson avenue, in the said city of Scranton, and there broke the bulk by opening a large box in which were packages wrapped up in separate parcels in quantities respectively as ordered, as per the said contracts, but without any name written or printed on any parcel, and from this point delivered the same to the proper purchasers at their residences, and collected the contract price therefor, and among the said goods there were some brooms in the large box,

tied together in a single bundle, which was broken and delivered to the respective purchasers thereof according to the contracts aforesaid.

"Fifth: The defendant aforesaid delivered all goods received by him in the manner above set forth without having first taken out or procured any license under the ordinance aforesaid.

"Sixth: The said goods delivered by the said defendant were no 'represented or held forth' by him or any other person 'to be bankrupt, assignee, about to quit business, or of goods damaged by fire, water or otherwise, or by any attractive or conspicuous advertisement whatsoever,' nor was the said defendant or his principal, the Citizens' Wholesale Supply Company, 'engaged in permanent business in the said City of Scranton.'

"Seventh: That a portion of the goods delivered by the defendant in the manner stated was manufactured by the said The Citizens' Wholesale Supply Company, and other portions of said goods were not manufactured or produced by said company."

The first question which presents itself is whether the acts of the defendant as above set forth constitutes a violation of the provisions of the ordinance in question. We do not think so. The ordinance is penal and must, therefore, be strictly construed. It was apparently intended to apply to that class of itinerant merchants who go about from place to place and temporarily engage in business under pretext of selling off goods which have been damaged by fire, or which have to be speedily disposed of on account of the bankruptcy or insolvency of the then owner or the late owner, or for some other imperative reason, and who advertise in such a way as to create the impression that on account of some such calamity or unusual circumstance bargains may be had. And whether its provisions would apply to one who temporarily engaged in business and who advertises his wares in the ordinary way is somewhat doubtful. But be that as it may, the facts of this case do not show any violation of its provisions.

The defendant did not enter into a transient business for the sale of any merchandise "from cars, platforms or transient warehouses." He did not represent that any of his wares were "bankrupt, assignee, about to quit business, or damaged by fire" goods, nor did he make use of "any attractive or conspicuous advertisement whatsoever." He sim-

ply went about and took orders for goods as an agent of a non-resident business house, and afterwards delivered them to the several purchasers and collected from them the prices at which they were sold. As far as the facts stated disclose the only difference between his acts and those of the ordinary commercial traveler for an individual, firm or company of a foreign state, was that ordinarily after an order is taken it is sent on to the seller and the goods are shipped to the purchaser direct; while in this case the goods represented by the different orders taken were assembled in bulk and shipped to the agent who broke the bulk and distributed the goods to the customers.

As we hold that the case is with the defendant upon the first question presented it is not necessary to discuss the others. We sustain the appeal and adjudge the defendant not guilty.

*In the Court of Common Pleas of Lackawanna County, No. 226,
January Term, 1906.*

CASE STATED.

W. W. Watt et al. vs. The Finn Coal Co.

It is a well known principle of construction that the language of a deed in case of doubt will be construed most strongly against the grantor.
It is a familiar rule that a deed or grant must be construed most strongly against the grantor. This applies with especial force to a reservation or restriction whereby there is a withholding of something from the grant.

Messrs. Willard, Warren & Knapp, for plaintiffs.

Messrs. Welles & Torrey, for defendant.

Opinion by Kelly, A. L. J., May 7, 1906.

The facts as agreed upon in the case stated, briefly stated, are as follows:

On the 28th of March, 1867, Stephen S. Clark, who was the owner of a piece of land in the City of Carbondale, containing twenty-three acres and sixty perches, more or less, by a deed in which his wife Miranda joined, conveyed to one Morgan Reese, the surface or right of soil of one acre and two perches of it, describing the same by courses, distances and boundaries, expressly reserving and retaining "all mineral coal in and upon the land enclosed by the above lines and the right to mine and take away the same without any liability whatever to said Reese, his heirs

and assigns, for damages caused thereby; the said Clark is not to disturb the coal lying directly under the house that is now built on the premises." On the 16th of June, 1873, Clark and his wife by deed conveyed to W. W. Watt and others, by description giving the courses and distances, the twenty-three acres and sixty perches above mentioned, and at the end of the description stating: "Excepting and reserving out of above about one acre previously sold to Morgan Reese, as described in deed of conveyance given to said Reese." On the 8th of June, 1904, Clark conveyed to Wade M. Finn by quit-claim deed all his right, title and interest in the coal in the one-acre and two perches, the surface of which had been sold to Reese in 1867, and Finn assigned his interest to the defendant. In the meanwhile, on the 3d of January, 1903, W. W. Watt and others, the grantees in the deed of the twenty-three acres and sixty perches made in 1873, made a lease of the coal underlying the tract to Wade M. Finn and Edward Roderick, which called for the payment of certain royalties. The interest of Finn and Roderick in the lease has passed to the defendant.

The defendant company claims ownership in the coal underlying the one acre and two perches and denies the right of the plaintiffs to collect royalties for mining it; while the plaintiffs claim that they acquired title to it by the deed from Clark in 1873, and that it passed by their lease made in 1903, and that the defendants are, therefore, under the terms of the lease, required to pay royalties for mining it.

The facts raise but one legal proposition, viz.: Did the coal under the one acre and two perches in question pass to W. W. Watt and others by virtue of the deed of Stephen S. Clark and wife made in 1873? As Clark only sold to Morgan Reese the surface and expressly retained and reserved the coal he was the owner of all of the coal under the whole tract when he made the deed, and in the general description he conveyed all of the tract, the whole twenty-three acres and sixty perches, by a description which carried all of the land, surface and minerals. So the question narrows itself down to the effect of the exceptions following the general description which we have already quoted, of about one acre already sold to Reese "as described in deed of conveyance given to said Reese."

The question does not appear to us to be at all difficult. It seems

clear that the intention was to except from the grant that which had already been conveyed away and which the grantor, therefore, did not own, that is to say, the surface. The exception is of about one acre sold to Reese and it refers to Reese's deed for a description of what was sold. Referring to it we find only the surface conveyed, and the coal reserved. We do not think the language of the exception is fairly susceptible of any other construction.

But conceding for the moment that such a construction is not clear and that it could be reasonably argued that it was the intention to retain the coal and except it from the grant, the most that could be said would be that the clause could be fairly construed both ways and that the effect of it was doubtful. In such case we could only reach the same result because of the well known principle of construction that the language of a deed in case of doubt will be construed most strongly against the grantor: *Beeson vs. Patterson*, 366 Pa., 24. "It is a familiar rule that a deed or grant must be construed most strongly against the grantor. This applies with especial force to a reservation or restriction in a deed whereby there is a withholding of something from the grant": *Paxson, J., in Klaer vs. Ridgway*, 866 Pa., 534. We are, therefore, of the opinion that the coal under the whole tract passed by virtue of the deed from Clark, made in 1873, and that his quit-claim deed, made in 1904, was of no effect. This decides the case for the plaintiffs.

We, therefore, direct judgment to be entered in favor of the plaintiffs and against the defendant in the sum of \$982.00 with interest from February 1, 1905, with the right of the defendant to appeal as stipulated in the case stated.

In the Court of Common Pleas of Lackawanna County, No. 120, November Term, 1904.

EXCEPTION TO REPORT OF VIEWERS.

In Re. Application of John A. Dieter for Appointment of Viewers.

The map attached to the report of viewers ought to indicate the properties affected by the improvement with the names of the owners.

Mr. James Mahon, for petitioner.

Opinion by Edwards, P. J., May 5, 1906.

While some of the exceptions to the viewers' report in this case are of a technical character most of them are well taken. The report is incomplete. Viewers' reports in cases like this ought to show:

1. What the improvement is.
2. The place and places where it has been made.
3. The damages, costs and expenses of the improvement as ascertained and determined by them upon the hearing.
4. The properties in the neighborhood particularly benefited by said improvement, and the names of the owners.
5. The properties damaged and the amount allowed in each case.
6. The amount of benefits assessed against each property benefited.
7. What amount of the total amount of damages, costs and expenses are left unprovided for by said assessment.

The map attached to the report ought to indicate the properties affected by the improvement with the names of the owners. This possibly might meet the most serious objection entertained by the exceptants, it appearing that appeals are pending in all the cases where damages have been allowed.

Without now formally disposing of the exceptions we refer the report back to the viewers so that they may file an amended or supplementary report within ten days from this date.

In the Court of Common Pleas of Lackawanna County, No. 767, May Term, 1905.

DEMURRER TO PLAINTIFF'S STATEMENT.

William Bagnell, etc., vs. Herman Osthaus.

In the absence of anything to show the provisions of the will, the presumption is that an executor acts for the estate of his testator.

Seeking to invoke a statutory right and to impose upon the defendant a statutory liability, the plaintiff must bring himself strictly within the terms of the statute. Failure to do so leaves a declaration demurrable.

Neither insolvency, ceasing to do business, nor utter inability to transact its affairs is the equivalent in law to a decree of dissolution.

Messrs. Welles & Torrey, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Newcomb, A. L. J., May 7, 1906.

The declaration in this case involves to some extent the career of a

Missouri corporation having a capital stock of sixty thousand dollars and assets amounting in the aggregate to nine dollars and eighty cents. The par value of its shares was ten dollars each. It is averred that 240 shares were issued by the company to the defendant, not in his own right, but as executor, etc., of one Jane K. Collins, deceased, in satisfaction of a debt owing by Alexander Dow, president of the company, to the Collins estate, and that it was so issued in pursuance of agreement between Dow and the defendant. It is also averred that as executor the defendant had no power to take the stock in that way for the estate, and, hence, this suit is brought against him personally to enforce an alleged liability which it is claimed the laws of Missouri impose upon all purchasers of such stock to pay to the company its par value. And it being further alleged that the company received nothing out of this transaction as the defendant well knew, the plaintiff asserts the right to sue as a creditor of the corporation. The declaration avers that he has recovered judgments against the company in the courts of that state, execution whereof has proven fruitless; that the company is insolvent, has ceased to do business, and "is utterly unable to transact its affairs."

So far as appears by the copy set forth in the declaration the only provision of the statute which is at all relevant is as follows: "If any company formed under the provisions of this chapter dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution without joining the company in such suit * * *." Whether this company was "formed under the provisions of this chapter" does not appear.

Moreover, as a matter of first impression this language might be regarded as a rather vague and general expression if the purpose was to create and define the right here set up by the plaintiff, but that may be a matter for the determination of the courts of that state. However that may be, it apparently relates to a right to sue after formal dissolution which, according to all procedure, so far as we knew, requires a decree of court or other tribunal clothed with authority to make such order. It may be that the statute uses the words "dissolve" and "dissolution" in some sense differing from their ordinary import when used to mark the termination of corporate existence. If so it should be made

to so appear by the context. We can give them only their ordinary and well known meaning in construing this declaration. It nowhere appears that this corporation has been dissolved. Neither insolvency, ceasing to do business, nor utter inability to transact its affairs is the equivalent in law to a decree of dissolution. Inability "to transact its affairs" implies the continued existence of the corporation, for if dissolved it would have no affairs to transact.

Seeking to invoke a statutory right and to impose upon the defendant a statutory liability the plaintiff must bring himself strictly within the terms of the statute. Failing to do so the declaration is for that reason demurrable.

But there is another reason fatal to the declaration. It isn't enough to say in mere general terms that the defendant had no power to accept this stock in payment of a debt due the estate of his testatrix. Whether he had or had not would depend upon the limitations of his powers as defined by her will. There is no presumption against his having such power and its existence isn't negatived by the naked averment that he did not have it. That is a legal conclusion which cannot arise out of such an averment. In the absence of anything to show the provisions of the will the presumption is that the defendant was acting for the estate of Mrs. Collins. That being so it follows that if otherwise actionable the plaintiff's claim is against the estate and not against the defendant.

The demurrer is sustained.

In the Court of Common Pleas of Lackawanna County, No. 295, May Term, 1906.

HABEAS CORPUS.

Commonwealth, ex rel., Jennie Jenkins vs. Anthony Seeger, Hattie Seeger and Jane A. Decker.

Where at a habeas corpus proceeding the adopting parent relinquishes all claim to a child, there is nothing left the court but to restore the custody of the child to the mother.

Mr. John R. Jones, for petitioner.

Opinion by Edwards, P. J., May 7, 1906.

The contest in this case is over the custody of a boy about 12 years of age. When a year old or less he was taken to the home of

Anthony Seeger, who evidently intended to adopt him, because we find that Seeger in November, 1895, filed a petition praying for a decree of adoption. A rule was granted returnable to a term of argument court, but no decree was ever signed. It is undoubtedly true, as counsel claims, that the matter was overlooked. Everything seems to be complete except the signing of the decree. We find the petition, the rule, the consent of the child's mother—all but the decree. The boy lived with Mr. and Mrs. Seeger while the husband and the wife lived together. When they separated the boy went with Mrs. Seeger and, as we understand the matter, is now living with her sister. The evidence taken at the hearing reflects severely upon the question of Mrs. Seeger's fitness as custodian of the child, and if this were the question in the case we would have no difficulty in awarding the custody of the boy to his mother, the relator, who is well able to take care of him. We find a legal question confronting us and this must be disposed of before we can determine the case on its merits. What right has Mrs. Seeger to the custody of the child? Did she acquire any right by reason of the adoption proceedings? We find that Mrs. Seeger's name is not mentioned in these proceedings, which are solely confined to Anthony Seeger. So far as Mrs. Seeger is concerned she is a stranger to the record. If Mr. Seeger were contesting the claim of the relator he could do so successfully, notwithstanding the fact that no decree of adoption was signed; but he presents a petition at the habeas corpus hearing waiving all right to the custody of the child, and praying that the boy be given to his mother, and also claiming that Mrs. Seeger is an unfit person to take care of the boy. We hold that Anthony Seeger is the only person who has any legal claim on the child, and if he relinquishes this claim, there is nothing left but to award the custody of the child to the mother. Our attention has been called to the case of Peterson's Estate, 212 Pa., 453, where it is stated that the cardinal fact in the adoption of a child is the intention of the adopting parent, and not the literal decree of the court. The facts in this case are very different from those of the case at bar. In the Peterson case while the petition was in the singular number it was signed by Samuel and Laura Peterson and there was a decree actually signed referring to the child as one of the heirs of the "petitioners."

After hearing and on proper consideration of the evidence we award the custody of Burton Jenkins, otherwise known as Burton Seeger, to the relator Jennie Jenkins. Each party is to pay her or their own witnesses' costs.

In the Court of Common Pleas of Lackawanna County, No. 578, March Term, 1906.

CERTIORARI.

W. L. Riley vs. J. R. Compton.

It is the better practice when proceeding to recover a penalty for the violation of the act of 1855, P. L. 53, prohibiting the sale of liquors on Sunday, to submit to the magistrate a sworn information or complaint before he issues the summons, although a praecipe might possibly answer the same purpose.

If the place where the law has been violated is in any poor district then the suit should be in part to the use of the overseers of the poor of the township or whatever the district might be called.

Mr. L. P. Wedeman, for plaintiff.

Mr. F. M. Lynch, for defendant.

Opinion by Edwards, P. J., May 7, 1906.

There are three cases before us involving the regularity of suits brought before aldermen and justices of the peace to recover the penalty for violation of the act of 1855, P. L. 53, prohibiting the sale of liquors on Sunday. Neither of the suits are properly brought. The second section of the act specifies clearly the manner in which such suits should be brought, and if the plain directions of this section were followed we would not be called upon to reverse proceedings of this nature one after another with such regularity.

The second section provides that any person violating the provisions of section one (selling on Sunday) shall for each offense forfeit and pay the sum of fifty dollars "one-half of which shall be paid to the prosecutor and the other half to the guardians of the poor," etc. The penalty is to be recovered "as debts of like amount are now by law recoverable, in any action of debt (now assumpsit) brought in the name of the commonwealth, as well for the use of the guardians of the poor, etc., as for the person suing." If the prosecutor is himself a witness the whole penalty is to be paid to the guardians or overseers of the poor.

Each of the three cases now before us is brought by W. L. Riley as plaintiff, which is manifest error. It is true that in the transcript we

find the following entry: "Whereupon the said W. L. Riley prays that the said defendant may be summoned at his suggestion to answer to the Commonwealth of Pennsylvania." This entry is of no moment because it is only a recital in part of the complaint. Nor do we find in either of the three cases any reference to any poor district by name, or to the overseers of the poor of any township.

We shall here make some suggestions as to the manner in which these suits should be brought. Taking the Compton case, in which this opinion is written as an instance, we find that the defendant lives in Olyphant borough, where it is alleged the violation of the law occurred. Olyphant is in the Blakely Poor District. Therefore the suit should have been begun thus: "Commonwealth of Pennsylvania to the use of W. L. Riley, as well as to the use of the Blakely Poor District, versus J. R. Compton." This is the way in which the summons should go out. We believe it is the better practice to submit to the magistrate a sworn information or complaint before he issues the summons, the suit being for a penalty, although a præcipe might possibly answer the same purpose. If the place where the law has been violated is not in any poor district, then the suit should be in part to the use of the overseers of the poor of the township or whatever the district might be called. As to the form of the judgment, to which exception is taken in some of these cases, we see no reason why the following would not be substantially correct: "After hearing the proofs and allegations in the case the alderman finds the defendant guilty and judgment is given publicly in favor of plaintiff and against defendant for the sum of \$50 and costs, one-half of which penalty of \$50 is to be paid to the prosecutor (naming him) and the other half to the ——— poor district," or overseers of the poor as the case might be. If the prosecutor is a witness the whole of the penalty should go to the proper poor district. And the execution should follow the judgment.

The proceedings in this case as well as in Nos. 728 and 115 March Term, 1906, are reversed.

Under a mortgage securing a series of notes due at intervals of one year, and providing that nonpayment of any one of them, together with nonpayment of taxes, should mature the entire debt, it is held in *Snyder vs. Miller* (Kan.) 69 L. R. A. 250, that the statute of limitations commences to run at the date of default upon the first note and taxes.

In the Court of Common Pleas of Lackawanna County, No. 949, March Term, 1906.

RULE FOR JUDGMENT.

Tobyhanna Creek Ice Co. vs. Bert Kime.

While book entries can be given using terms commonly known in the trade; yet the character of the business must be stated somewhere so as to make the statement intelligible, precise and concise.

Opinion by Edwards, P. J., May 7, 1906.

Considering the character of the plaintiff's statement, the rule for judgment for the want of a sufficient affidavit of defense must be discharged. Plaintiff in its general statement states that the suit is brought for "goods, wares and merchandise sold and delivered," etc., and there is attached a copy of the book account; but nowhere is it stated what the nature of the "goods" is. We may infer from the name of the plaintiff and a credit at the end of the book account that "ice" was the subject of the transactions between the parties; but it may also be inferred that "cars" were the commodities dealt in. It is true that book entries can be given using terms commonly known in the trade; yet the character of the business must be stated somewhere so as to make the statement intelligible and precise and concise. It has been ruled several times that a defendant may in his affidavit call attention to a defective statement.

Rule for judgment is discharged.

In the Court of Common Pleas of Lackawanna County, No. 49, May Term, 1906.

QUO WARRANTO.

Commonwealth of Pennsylvania ex. rel.; P. D. Manley vs. August Wahlers.

Quo warranto will lie where a person is still exercising and claiming the right to exercise, at least in part, the duties of a public office.

Messrs. Zimmerman & Scheuer, for relator.

Mr. I. H. Burns, for respondent.

Opinion by Edwards, P. J., May 7, 1906.

By the terms of the special act of assembly incorporating the borough of Dunmore (Act of 1882, P. L., 526) it is provided that the borough treasurer shall be elected annually and that as such treasurer he

shall also be treasurer of the school fund. The plain meaning of this provision is that the distinctive office held is that of borough treasurer—a borough office, and that the incumbent of this particular office ex-officio collects and disburses the school funds. The respondent, August Wahlers, was elected borough treasurer in February, 1905, his term expiring March 5, 1906. Last February the relator was elected to the same office, and, as we understand the situation, has qualified and is exercising the duties particularly pertaining to the borough itself, while the respondent claims the right to act as treasurer of the school fund until next June. In effect, he says that while it is true he has ceased to be borough treasurer he is still school treasurer. This position is inconsistent, anomalous and untenable. If he is now collecting and disbursing school funds he is doing so in defiance of law. His right to act as school treasurer ceased on March 5th last and it was his duty at that time to turn over all moneys and papers in his hands to the relator, P. D. Manley. Instead of doing this the respondent is continuing to act as school treasurer which is equivalent to saying that he is still *borough* treasurer for some purposes.

Respondent's counsel claims that the plaintiff has mistaken his remedy and that mandamus would be the proper proceedings to compel the respondent to turn over to the relator the papers and moneys belonging to the school fund. It may be that mandamus would correct the wrong, but it would not necessarily settle the whole claim of the respondent. We see no reason why quo warranto will not lie, on the ground that the respondent is still exercising and claiming the right to exercise, at least in part, the duties of borough treasurer. It is true that he has relinquished a part of the powers of the office, but he holds on to the part involving the control of the school fund. In other words, he is still acting as borough treasurer.

On the demurrer we enter judgment against the defendant. We hold the defendant guilty of unlawfully exercising the office of treasurer of the borough of Dunmore, and we give judgment of ouster against defendant that he be altogether excluded from said office and from exercising any of the powers and privileges of said office. We direct the defendant to pay the costs.

In the Court of Common Pleas of Lancaster County, No. 56, September Term, 1903.

RULE FOR A NEW TRIAL.

Nissley et al. vs. Hoffman Bros.

Where the judgment of a magistrate is set aside on certiorari for want of legal service, the plaintiff may bring a new suit.

There is nothing in the Act of May 11, 1901, P. L. 164, that prevents the plaintiff from beginning another action until after he has paid the costs in the one which has been set aside, and even though there was, it would not be effective where no judgment was entered on the record for the defendant on the certiorari.

A party is not entitled to complain of the remarks of counsel to the jury on a trial where no objection was made before the jury retired.

Messrs. C. E. Montgomery and Willis G. Kendig, for rule.

Mr. C. Reese Eaby, contra.

Opinion by Hassler, J., July 8, 1905.

It is contended on behalf of the defendants that we should have given binding instructions to the jury to find a verdict in their favor, because a judgment was entered on January 20, 1903, involving the same parties and the same cause of action as that in the present suit, and that it was unsatisfied at the time this suit was commenced.

It appeared that plaintiffs had brought suit before an alderman against these defendants and one other for the same cause of action as that on which the present suit is based, and obtained a judgment against them. On a writ of certiorari, the proceedings before the justice were set aside by this court on December 20, 1902, because there had been no legal service of the summons, and the alderman had, consequently, no jurisdiction: See *Nissley vs. Hoffman*, 20 *Lanc. Law Rev.* 49.

When those proceedings were set aside there was no judgment on or adjudication of the cause of action involved in this case. The plaintiffs were at liberty to bring a new suit, in order to have the matters involved adjudicated, and as this one was not commenced until August 15, 1903, eight months after the first proceedings were set aside, it was not commenced too soon.

Our attention has been called to the Act of May 11, 1901, P. L. 164, which provides that when the proceedings of a justice of the peace are reversed on certiorari, and judgment given by the court for the defendant, said judgment shall be entered of record and shall carry

with it all costs incurred in the case. When the proceedings in the first suit were set aside, no judgment was entered for the defendant in this court on the cause of action involved here. The merits of the question were not passed upon in that decision. The only question was the jurisdiction of the justice, and, it appearing that he did not have jurisdiction, the proceedings were set aside, leaving the parties in the same position as though no suit had ever been commenced. At most, the Act of Assembly, so far as this case is concerned, gave a new remedy for costs other than the one provided for by the Act of March 20, 1810, Sec. 25, 5 Sm. Laws, 161, which is the only other act on the subject. There is nothing in the Act of 1901 that prevents the plaintiff from beginning another action until after he has paid the costs in the one which has been set aside, and even though there was, it would not be effective in this case, because no judgment was entered for the defendants, and therefore it would not be a bar to the plaintiffs proceeding as they did in beginning the present suit: *Com. vs. Hoffman*, 21 *Lanc. Law Rev.* 173.

It is also contended that we should have given binding instructions to the jury to find a verdict in favor of the defendants, for the reason that "The defendants, under the contract in suit, had the right to demand a reduction for damaged tobacco and be the judges thereof. The evidence is that they tried to exercise that right and the plaintiffs would make no reduction, wherefore the defendants had a right to rescind the contract."

This reason does not state all the evidence. One of the defendants testified that he demanded a reduction because the tobacco was damaged, but the plaintiffs testified differently. This left a question of fact for the jury. We left it to the jury in the following language:

"Under the terms of the contract, as I have said, the plaintiffs agreed that Hoffman Bros., the purchasers, were not to receive any damaged tobacco without deduction, and whether it was damaged, and what was to be deducted, was to be judged by Hoffman Bros., the defendants. If, then, you believe from the testimony that B. F. Hoffman went to the place where the tobacco was located at the request of the plaintiffs, as he said he did, or at the request of either of the plaintiffs, and, in his opinion, found the tobacco damaged, and refused to pay the price agreed on for that reason, then he was acting within the terms of

the contract, doing what the terms of the contract gave him the right to do, and plaintiffs cannot recover anything.

"The plaintiffs, however, claim in their testimony that B. F. Hoffman came there and did not complain much about the quality of the tobacco, but said he had bought it too high, that he would not take it, and wanted to buy it for less. If you believe this, that the defendants did not want to deduct from the price because of any damaged tobacco, then plaintiffs are entitled to recover."

An examination of the testimony shows us that this was a fair submission of this disputed fact to the jury, and we therefore did not err in so instructing them and leaving this question to them.

The defendants are in no position to complain of the remarks of counsel for the plaintiff to the jury. No objection was made to these remarks before the jury had retired. As we recall them, the remarks of counsel for the plaintiff to the jury were improper, and we so told the jury, and gave them such explanation of the questions upon which the improper remarks were made as we believed to be proper, and we are satisfied that the remarks complained of, after our explanation, did not do any harm to the defendants.

There was sufficient evidence to justify the verdict, and as it was entirely within the province of the jury to pass upon the facts, we see no reason why we should interfere with it.

This disposes of all the reasons for a new trial, and we discharge the rule.

Rule discharged.

When a contract between two or more persons on one side and two or more persons on the other creates a situation involving presently or proximately separate rights upon one side each of which, with a violation thereof by the other side, would constitute a complete ground of complaint for judicial redress, the making of the contract is held, in *Emerson vs. Nash* (Wis.) 70 L. R. A. 326, to be a "transaction," within the meaning of a statute permitting the joinder of causes of action arising out of the same transaction; and such grounds of complaint are held to be separate "causes of action arising out of the same transaction," within the meaning of the statute.

*In the Court of Common Pleas of Lackawanna County, No. 1,030,
September Term, 1905.*

**RULE TO DISSOLVE ATTACHMENT UNDER ACT OF 1869
AND SUPPLEMENTS.**

Stowers Pork Packing and Provision Co. vs. Shoener.

An attempt to defraud within the meaning of the Fraudulent Debtors' Act of March 17, 1869, P. L. 8, as amended by the Act of May 24, 1887, P. L. 197, cannot be inferred from an intent to prefer a creditor.

The Act of March 28, 1905, P. L. 62, relative to the sale in bulk of the whole or a large part of a stock of merchandise and fixtures, or merchandise, or fixtures, not in the ordinary course of business, does not enlarge the operation of the fraudulent debtors' attachment, which has to do only with actual fraud.

Messrs. Welles & Torrey, for plaintiff.

Messrs. Vosburg & Dawson, for defendant.

Opinion by Newcomb, A. L. J., November 14, 1905.

The plaintiff by his affidavit, upon which the writ was founded, averred, first, that the debt in suit was fraudulently contracted; second, that the defendant had disposed of his property with intent to defraud his creditors. Both of these allegations were traversed by defendant's petition for this rule. This cast the burden of proof upon the plaintiff. The depositions before us fail to sustain either averment. The most that can be said, under the evidence, is that being indebted to various creditors, among whom was his landlord on account of rent in arrears, amounting to upwards of \$500, the defendant gave the landlord a preference by transferring to him without notice to other creditors the bulk of his property in satisfaction of that claim. The bona fides of the transfer is not impeached. The property consisted of the stock, implements, furniture, fixtures and machinery of a retail meat business which the defendant had been carrying on in the demised premises. Its value is not shown to have been in excess of the rent which he was owing, and was probably less than that amount. He got not only a receipt in full, but a release from further liability.

An intent to defraud within the meaning of the attachment act cannot be inferred from an intent to prefer a creditor: *Loucheim vs. Marks*, 2 Pears. 268; *Rice vs. Warren*, 3 Del, 283; *Easterline vs. Jones*, 2 Kulp, 121.

But it is contended that the transaction falls under the ban of the Act of March 28, 1905, P. L. 62, relative to such sales. The argument

is that, inasmuch as the provisions of the act requiring notice of the proposed sale to be given to creditors of the seller were not complied with, the sale must as to them be deemed fraudulent. If it were a case calling for the application of this statute, there might be grave doubt as to its constitutionality. But we think it is not such case. It will be time enough to meet that doubt when it arises in a case necessarily requiring its determination. Assuming, for the purposes of this proceeding, that the act is valid, it defines and deals with a constructive, not an actual fraud. Hence, as in other instances of constructive fraud, the purchaser takes a defeasible title to the property in question. His title may be impeached by the creditors of the seller if timely action be taken. To do this they may treat the property as if never transferred and take it in execution upon a judgment against the seller. We cannot see how the Act of 1905 enlarges the operation of the fraudulent debtors' attachment, which has to do only with actual fraud, the existence of which, as we have said, has not been shown here.

The rule to show cause is made absolutely and the attachment is dissolved.

In the Court of Common Pleas of Lackawanna Count, No. 1499, September Term, 1905.

RULE TO STRIKE OFF PLEA IN ABATEMENT.

Peter Antonio vs. Rocky Glen Water Co. et al.

A plea in abatement, being a dilatory plea, should be interposed at the first opportunity. While such plea should be entered within four days after appeal is filed yet under proper circumstances the court may, in its discretion, allow it to be entered at a later time.

Mr. H. C. Hubler, for plaintiff.

Messrs. Vosburg & Dawson, for defendants.

Opinion by Kelly, A. L. J., June, 1905.

The general rule of law is that a plea in abatement must be entered before a plea in bar. Being a dilatory plea it is not very highly favored. It must be interposed at the first opportunity, or, as has been laid down in the text books and in several Pennsylvania cases, within four days after the declaration has been delivered: *Chamberlain vs. Hibe*, 5 Watts, 373; *Stover vs. Gloninger*, 6 S. & R., 63; *Stage Company vs. Hartzell*, 22 Pa., 277; *Daniells vs. Sanderson*, Id., 443; *Chitty*

on Pl., (16 Am. Ed.) Vol. 1, p. 472. Under our rules of court when an appeal from the judgment of a justice of the peace is filed in the Common Pleas, the transcript constitutes of the plaintiff's declaration and the case is at issue without any formal plea, so, even conceding for the argument's sake that it was not necessary to enter the plea before the magistrate, it should have been entered within four days after the appeal was filed. In this case the appeal was filed on September 18, 1905, while the plea in abatement was not filed until November 3d following, clearly too late. While under proper circumstances the court may, in its discretion, allow a plea in abatement to be entered at a later time: *Hurst vs. Fisher*, 1 W. & S., 438; *Riddle vs. Stevens*, 2 S. & R. 537; in this case there are no facts disclosed which justify the delay.

The rule to strike off the plea in abatement is made absolute.

In the Court of Common Pleas of Delaware County, No. 66, March Term, 1904.

DEMURRER TO STATEMENT.

Norwood Borough vs. Harrison.

A borough brought assumpsit against a property owner to recover from him the amount of a judgment which had been recovered against it for injury received from a defective sidewalk in front of his property. The owner had notice of the original suit. Held, that assumpsit could be maintained.

Mr. W. I. Schaffer, for demurrer.

Mr. E. P. Bliss, contra.

Opinion by Johnson, P. J., September 5, 1904.

Mary Atkinson recovered a judgment against the Borough of Norwood for injuries suffered by reason of a defect in the sidewalk in front of premises owned by William H. Harrison, Sr. The borough having paid the judgment, brought this suit in assumpsit to reimburse itself for the amount paid. The defendant demurred. His contention is that assumpsit is not the proper form of action.

All similar cases heretofore brought in this state, as far as has been ascertained, have been brought in trespass. This question, however, does not appear to have been raised. The fact that all the other cases have been in trespass is a strong argument in its favor. This plaintiff, however, insists that assumpsit is the proper form of action. I am not clear that he is wrong.

In the suit against the borough, Mr. Harrison had notice; he appeared and made defence. The judgment against the borough is conclusive as to the existence of the defect in the pavement, of the injury to the plaintiff while exercising due care, and of the amount of the damage.

This defendant cannot raise the question as to whether or not Mary A. Atkinson has suffered a wrong or injury, because of the defective condition of the street, nor question the accuracy of the sum awarded her. True, he may make defence as to matters not settled by the verdict against the borough. He may show that the borough is estopped, or that he is not personally liable, that he does not own the land, or other defence. All this may be set up in action of assumpsit.

It may be that if the defendant had not received any notice of the suit against the borough, and knew nothing about it that trespass would be the proper form of action. In this case, however, I am of the opinion that the suit is properly brought.

Demurrer overruled.

In the Court of Common Pleas of Lancaster County, No. 177, April Term, 1905.

RULE TO OPEN JUDGMENT.

City Savings Fund and Trust Co. vs. Lintner.

A wife's signing of a joint note with her husband, if done for his benefit, either to pay existing debts or to be used in his business, makes her a surety for him, even though the check for the proceeds was made out in her name and by her endorsed to her husband.

Where the allegations of a petition to open a judgment are denied under oath, it is necessary for the petitioner to prove the truth of such allegations by the testimony of an additional witness or corroborating circumstances.

A wife endeavoring to open a judgment alleged to have been signed by her as surety for her husband is in the same position, so far as concerns the proof necessary, as any other person would be.

Mr. W. U. Hensel, for rule.

Messrs. John E. Malone and Coyle & Keller, contra.

Opinion by Hassler, J., January 6, 1906.

Sallie E. Lintner, the petitioner, asks to have the above judgment opened for the reason that she, a married woman, being surety for her husband on the notes, is not liable for their payment.

In Jenkintown National Bank's Appeal, 124 Pa. 337, and Kaier

Co. vs. O'Brien, 202 Pa. 153, the Supreme Court state the rule to be, where the allegations of a petition to open a judgment are denied under oath, that it is necessary for the petitioner to prove the truth of such allegations by the testimony of an additional witness or corroborating circumstances. Adopting the rule as a measure of proof required of the allegations in this petition, the following are the facts which the court can consider in disposing of this rule:

In October, 1903, and May, 1904, H. C. Lintner, the husband of the petitioner, went to the City Savings Fund and Trust Company and endeavored to obtain money for the purpose of carrying on his business. He was told by the president of that institution that if he brought judgment notes signed by his wife the company would lend the amount desired. The president of the company prepared joint notes, containing warrants of attorney to confess judgments, which the said H. C. Lintner took to his wife. She signed them, and he signed under her name, to all appearances, as joint makers. The notes were then brought to the City Trust Company the same days on which they were signed, and the president of the company gave a check for the amount of each note, payable to Sallie E. Lintner, the petitioner. She endorsed said checks and gave them to her husband, who deposited one to his own account, and for the other secured a draft payable to himself. The president of the City Trust Company, H. C. Lintner and Sallie E. Lintner all knew that the money was being borrowed for the purpose of assisting H. C. Lintner, the husband of Sallie E. Lintner, the petitioner, to conduct and carry on his business. One judgment was entered on both notes, which we are now asked to open.

In Stewart vs. Stewart, 207 Pa. 59, which is a case very much like this one, the following facts are shown in the opinion of the Supreme Court:

The husband was president of a bank and largely indebted to it and to its vice-president. The vice-president agreed to and did loan \$18,000 under the following circumstances: The wife gave to the vice-president her own note for \$7,000, secured by her own bank stock. She also joined her husband in a bond to the vice-president for \$11,000, giving a mortgage to secure it on her separate real estate. The check for \$18,000 was made by the vice-president; payable to the wife, who

endorsed it and gave it to her husband. The husband deposited it in bank to his own account and use the proceeds of it to liquidate his indebtedness to the bank and to its vice-president. The vice-president, the husband and the wife all knew that the money was being raised to pay the husband's debts. On a question of the distribution of the proceeds of the sheriff's sale of the wife's property, the Supreme Court, reversing the court below, held that the wife was a surety for her husband. On page 66, Justice Dean, who delivered the opinion of the court, said: "While there is a strong sentiment of affection growing out of the marital relation which would induce a wife to do that for her husband which she would do for no other, yet her acts as between her and his creditors are governed by the same rules of evidence that operate in transactions between others. She stands on exactly the same footing as all the other creditors of her husband; the same evidence which would establish a stranger's right will establish hers, except as to the income of her separate estate; there the receipt of such income by the husband without objection on her part is presumptively a gift to the husband instead of a loan. In the case before us, the question is, was she surety to Fulmer for the husband's debt? Suppose, instead of the wife, a mere friend had come to the help of the husband in his extremity; had joined the husband in a bond, had mortgaged his own land to secure the bond, then this money had been handed to the husband, and he with the money had paid his debt of which his friend owed nothing. From these facts, without more, the presumption would be that the friend was a surety; it would require very strong evidence to rebut the presumption. The wife is in no less favorable position, so far as concerns proof, than the friend. The motive to impel her to become surety to the husband's creditors may be stronger, but the rules of evidence impose upon her no heavier burden in establishing her suretyship than upon any other creditor."

The present case is like the case of *Stewart vs. Stewart* in all but one particular. Here the petitioner joined her husband in two notes containing warrants of attorney to confess judgment, to all appearances as a joint maker with him. The checks were made payable to her, and by her endorsed to her husband, who deposited one in bank to his own account and for the other obtained a draft in his own name. He used

the proceeds of both notes to assist him in carrying on his business of dealing in horses and mules, the president of the City Trust Company, the husband and the petitioner all knowing that the money was being raised for the benefit of the husband. The one particular in which the cases are not similar is that, in the case of *Stewart vs. Stewart*, the money was raised for the benefit of the husband, and was used by him to pay an existing indebtedness, while in the present case the money was raised for the benefit of the husband, but was used by him in conducting and carrying on his business.

Unless, therefore, the use which the husband makes of the money can affect the liability of a wife who lends her name to assist him in raising money, the case of *Stewart vs. Stewart* rules the vital question in the present case; that is, whether or not the petitioner was a surety for her husband in raising the money obtained on the two notes signed by her.

The Act of June 8, 1893, sec. 2, P. L. 344, authorizes a married woman to make all contracts, except that "she may not become accommodation endorser, maker, guarantor or surety for another." She is forbidden to become surety for another, regardless of whether the fruits of her suretyship are used to pay a past indebtedness or in the future conduct of a business. Her signing a joint note with her husband, agreeing to pay the money borrowed, fixes her status. If it was done for his benefit, it made her a surety, even though the check for the proceeds was made out in her name and by her endorsed to her husband. The use of the money by the plaintiff could not affect or change the nature of the obligation which she assumed when she signed the notes. If she was a surety on such obligations when she signed the notes, she continued as surety when the husband used the money either to pay an existing indebtedness, as in *Stewart vs. Stewart*, or to use in carrying on his business.

Suppose, instead of his wife, a mere friend had come to help H. C. Lintner, had joined him in the notes and handed the money to him; from these facts the presumption would be that the friend was a surety. It would require very strong evidence to rebut this presumption. The wife is in no less favorable position, so far as concerns proof, than the friend. The same evidence that would establish the friend's right will establish hers. This is nearly the language used by Justice Dean in

Stewart vs. Stewart, 207 Pa. 59. We are of the opinion that the facts in this case show that the petitioner is a surety for her husband on the notes on which this judgment was entered, and entitled to have it opened, and we make absolute the rule to open it.

Rule to open judgment made absolute.

In the Orphans' Court of Philadelphia County, No. 218, January Term, 1903.

EXCEPTIONS TO READJUDICATION.

Singer's Estate.

A sale by a legatee or distributee of his legacy or distributive share will not be set aside unless effected by fraud, although the price is grossly inadequate and the bargain unconscionable on the part of the purchaser.

In the case at bar, the sale of an interest for \$500 which proved to be worth \$5,000 was sustained, in the absence of fraud.

Mr. R. S. Bright, for exceptant.

Messrs. J. A. Miller and T. A. Fahey, contra.

Opinion by Ashman, J., May 23, 1906.

The exceptions relate to the award of the share in his father's estate of John Singer, a son, to Sarah C. Hackett, an alleged purchaser of his interest. The share amounted to about \$8,000, against which a mortgage for \$3,000 had been given by the son, leaving a net value of \$5,000, for which the claimant paid \$500. The testator's will directed an accumulation of the income of his estate until the arrival at full age of his youngest child, at which time his estate should be equally divided among his children, six in number. John Singer, the son, secured a loan on mortgage of \$1,000, and, according to his testimony, afterwards applied to George E. Hackett for an additional loan of \$3,000. He sought this aid of Hackett, who appears to have effected a loan for his brother in consequence of written offers from Hackett to loan money upon his share, or to purchase it outright. The first communication was dated April 22, 1903, and read as follows: "Mr. John Singer. Dear Sir: Any time you might desire to secure an additional loan or sell your estate interest, I would be pleased to have you call and see me." The note enclosed the card of the writer, headed, "Loans, Real Estate, Investments, &c., 635 Walnut St." Singer called upon Hackett, but was put off, and he finally effected the loan through a building association and satisfied the prior mortgage of \$1,000. In

November, 1903, Singer asked Hackett if he would secure a loan of \$1,000, to which Hackett replied that the share was not worth that sum, because it was not payable for nine years. He finally declared that his wife would loan \$500, and this offer was accepted by Singer, who thereupon, with his wife, signed and acknowledged certain papers which he supposed were evidences of a loan. This was the narrative in brief of the transaction as told by Singer and corroborated by his wife. Both admitted the execution of the assignment, the deed and the transfer of the building association stock, and Singer also admitted that the papers had been submitted to him for examination, but declared that he had only glanced over them, believing them to be simply evidences of a loan.

The claimant, however, produced a postal card in the handwriting of Singer, which was flatly contradictory of the theory of a loan. It was dated Nov. 5, 1903, and read: Dear Sir: My interest in my father's estate is for sale. I will sell it for \$1,000 cash, subject to the \$3,000 mortgage. If you wish to buy it, let me know as soon as possible, as another party had bid that amount and I will give you the first chance. Yours respectfully, John Singer." Hackett testified that, in answer, he offered to purchase at \$500, which reply the son denied receiving. His letter dated Nov. 26 was thereupon produced, saying: "I will take your offer of \$500, but I must have the money before next Wednesday." This correspondence is open to one construction only. If there is any ambiguity, it is removed by the after-conduct of the son. He paid no dues to the building association and no interest on his mortgage to the association for \$3,000, which were no longer necessary, if he had parted with his title. We do not hesitate to say that the bargain on the part of the buyer was unconscionable, because the price was grossly inadequate. But this, if the bargain was not brought about by fraud, affords no ground for setting the sale aside: *Whelen vs. Phillips*, 151 Pa. 312; *Robbins' Estate*, 199 Pa. 500. Was there fraud on the part of the purchaser or her agent? None certainly is visible on the face of the transaction. The son makes a distinct offer in writing to sell his share in the estate; he signs and acknowledges the assignment and the deed to the purchaser, and transfers to her the stock in the building association from which he had procured a mortgage loan, and he admits that ample opportunity was given for scrutinizing the papers, and he

ceases from the date of the transaction to pay the dues and interest to the association which, as owner of the mortgaged share, he was obligated to pay. Was there fraud which arose out of the relations of the parties? The agent of the seller was the agent of the buyer, a relationship which is common enough among real estate brokers, and provocative enough of fraudulent practices; but the purchaser here was the wife of the agent, and from their community of interests a commission paid by the wife practically came from the pocket of the agent. The judicial decision that the trust created by the will was invalid, and that the children's interests vested at testator's death, was not rendered until after the dealings between the parties had closed. If the claimant had, prior thereto, been advised by counsel as to the nature of the testamentary trust, and had continued to assure the son that the interest was uncertain, his concealment of the information might have vitiated the bargain; but it was not shown that he had been so advised, and, besides, the expediency of securing legal advice must have been as apparent to the seller as to the buyer, and the means of obtaining it were as open to one as to the other.

In *Bennet vs. Bennet*, 43 L. T. (N. S.) 246, Sir George Jessel said, "there is no reason why a man should not be a fool." As a corollary to that saying, it may be added that there is no reason why a court should protect a fool against the result of his folly. No new feature of rapacity in the buyer is apparent in this instance to make him a worse offender against the law of fair dealing than an army of Shylocks who have preceded him. The Patriarch Jacob bought a large landed estate from an improvident brother for the price of a frugal breakfast, and the common parent, when appealed to, upheld the bargain. A "catching bargain," much later in date than that between Jacob and Esau, was passed upon in *Davidson vs. Little*, 22 Pa. 245, where the owner of land worth \$8,000 conveyed his interest for \$200. The court held that the transaction was suggestive of fraud, but that the contract was binding if the vendor was of full age, of sound mind, acquainted with the necessary facts and subjected to no mental imprisonment.

The exceptions to the readjudication are sustained, and the award made by the original adjudication is reinstated.

*In the Orphans' Court of Philadelphia County, No. 164, July Term,
1885.*

EXCEPTIONS TO ADJUDICATION.

Abbott's Estate.

Testator, after devising the residue of his estate to his wife for life, provided as follows: "From and immediately after the death of my said wife, then I give, bequeath and devise all the said residue unto all and every of my children, their heirs, executors, administrators and assigns, forever, in equal shares, as tenants in common, and if any of my children should die before the decease of their mother, leaving issue, then such issue shall take the share their parent would take if living, *per stirpes*." Held, that the children took vested interests, subject to be divested in the case of a child dying before the life tenant and leaving issue.

Messrs. William Rudolph Smith and S. E. Megargee, for expectant.

Messrs. B. F. Pepper, W. B. Bodine, Jr., and G. W. Pepper, contra.

Opinion by Ashman, J., May 19, 1906.

The testator, after a specific bequest of household effects to his wife, devised and bequeathed to her the residue of his estate for life. He then provided as follows: "From and immediately after the death of my said wife, then I give, bequeath and devise all the said residue unto all and every of my children, their heirs, executors, administrators and assigns, forever, in equal shares, as tenants in common, and if any of my children should die before the decease of their mother, leaving issue, then such issue shall take the share their parent would take if living, *per stirpes*." Of the five children of testator, two of the sons, James C. and Charles L. Abbott, died in the widow's lifetime. James left a widow and three children, and Charles died without issue, and leaving a will, by which he gave his estate to his mother. The auditing judge held that the children took vested interests, subject to be divested in the case of a child dying before the life tenant and leaving issue. Under this ruling, the share of James passes to his three children, and the share of Charles to his mother as the sole beneficiary named in his will.

The decision of the auditing judge was based on Carstensen's Estate, 196 Pa. 325, where the gift of the residue after a life estate was to testatrix's brothers and sisters, followed by the words: "The child

or children of any of my said brothers or sisters who may then be dead to take and receive the share that his or their parent would have taken if living." The shares of the brothers and sisters were held to have vested at the death of testatrix, subject to be divested only on the leaving of issue during the life tenancy. We cannot well distinguish that case from the present, the gift in the one case being, in the first instance, absolute to the brothers and sisters, and in the other to the children of the decedent; and subject in both to be divested by death during the life tenancy leaving issue. Two rules of construction favor the conclusion reached in the adjudication: One of them founded upon a principle of human nature, that an heir will not be disinherited except by express words or necessary implication, and the other which prefers vested to contingent interests. The time at which the estate of the children was to vest in enjoyment was the death of the widow, and the limitation over took place at that time only in the case of the child who should then be dead leaving issue. "The question of vested or contingent," it was said in *Manderson vs. Lukens*, 23 Pa. 31, "is not to be tested by the certainty or uncertainty of obtaining the actual enjoyment; neither does it depend upon the defeasibility or indefeasibility of the right of possession. If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, it is, nevertheless, a vested estate. An unpossessed estate is vested if it is certain to take effect in possession by enduring longer than the precedent estate." In other words, a limitation over in case the legatee shall die before the period of distribution, without more, always denotes an intention that the gift shall immediately vest in the legatee. Mr. Hawkins, in his *Treatise on Wills*, page 240, puts it thus: "If real estate be devised to A. 'if' or 'when' he shall attain a certain age, with a limitation over in the event of his dying under that age, the attainment of the given age is held to be a condition subsequent and not precedent, and A. takes an immediate vested estate, subject to be divested upon his death under the specified age. Or if the devise be to A. if or when he shall attain a given age, with a limitation over upon his death under that age without issue, A. takes a vested estate defeasible only in the event of his death without issue under the specified age.

The rule is the same where the devise is to a class." In the light of the quoted maxims and of the innumerable authorities which have enforced them, it is just to require very strong indications of an intent on the part of a testator to make his gift contingent. In the present will, the testator uses the word "then" in the gift to the children, the language being, "And from and immediately after the death of my said wife, *then* I give the residue of my estate unto all and every of my children." In *King vs. Crawford*, 17 S. & R. 118, where the legacy was to A. until B. should attain a certain age, and then to B., the legacy to B. was held to be contingent. There, however, time was annexed to the gift itself; here it is clear that the word "then" was employed simply to denote the succession of events,—a sense in which it appears in perhaps a majority of wills.

Under the principles of construction followed in *Carstensen's Estate*, 196 Pa. 325, we are not at liberty to regard the interest of a child dying without issue before the life tenant as a *casus omissus* in the present will. What was said in *Adams' Estate*, 208 Pa. 500, of *Carstensen's* will, is applicable here: "The gift to the brothers and sisters was in absolute terms, with no condition that they should be living at the death of the tenant for life; there was simply an alternative limitation that if a brother or sister should be then dead, but leaving issue, his issue should be substituted to his interest." This case is stronger from the circumstance that his children are presumably nearer to the heart of a testator than collateral relatives. The absolute gift to the children in the will before us was unaffected by the event of their survival or non-survival of the life tenant, except in the single contingency of a death in her lifetime leaving issue. Hence, the son who died without issue, living the life tenant, stood on the same level with the children who outlived the widow.

The share of James C. Abbott, we think, was properly awarded to his three children, and the share of Charles L. Abbott to his mother as sole legatee under his will.

The exceptions are dismissed.

The right of a police officer to take life to prevent the escape of one whom he is attempting to arrest for misdemeanor is denied in *State vs. Smith* (Iowa) 70 L. R. A. 246.

In the Court of Common Pleas of Lackawanna County, No. 42, September Term, 1904.

RULE FOR A NEW TRIAL.

W. H. Szytler vs. The Scranton Railway Co.

In the ordinary operation of its cars a street railway company is not responsible for the fright of horses driven along the street so as to be in duty bound to stop the car whenever it appears that horses are frightened.

A person suddenly placed in danger, without fault on his own part, is only held to the exercise of his judgment honestly, whether it is the judgment that some other person of ordinary care and skill would exercise in the same situation or not.

Mr. George D. Taylor, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Newcomb, A. L. J., June, 1906.

The plaintiff was driving his team and coach northward on Pittston avenue. As he approached the intersection of Birch street one of defendant's cars came out of Birch street into the avenue. The team was frightened and shying to one side, the wagon was broken and overturned by the wheels becoming cramped against either the curb or a heavy flagstone overlying the gutter at that point.

There was a verdict for defendant and the plaintiff asks for a new trial on two principal grounds. The first goes to the view which we took of the case as laid in the declaration. As originally framed it charged that the team became frightened and uncontrollable because of the unusual and extraordinary appearance of the car which was alleged to be carrying a large number of passengers on the roof who were making noisy outcries and other disorderly demonstrations. In addition to that it charged that upon the first discovery of the car and the excitement of his horses the plaintiff signaled the motorman to stop, and averred that the latter was guilty of negligence in disregarding his signal in consequence of which the injury was sustained.

At the trial it did not appear to us that there was any evidence from which the jury could be permitted to infer that the accident would have been avoided by the stopping of the car, even assuming that it was the duty of the motorman to stop his car upon notice that an approaching team was frightened. It was not alleged that such duty existed because there was danger of collision, nor that the fright was occasioned by an unusual speed nor even by the motion of the car. It

can be said with confidence that in the ordinary operation of its cars the defendant is not responsible for the fright of horses driven along the street so as to be in duty bound to stop the car whenever it appears that horses are frightened. According to both the allegation and the proofs the horses were well accustomed to the street cars and were not afraid of them, and the cause of their fright in this instance was the unusual appearance of this car occasioned by the presence and behavior of the passengers on its roof. It is well known and undisputed that there are no "roof cars" or cars fitted for carrying passengers on the roof in use in this city. Hence, if the plaintiff had a case it arose from a cause unconnected with the motion of the car. Therefore, after some discussion of a motion for non-suit we permitted the plaintiff to go to the jury upon amending his declaration so as to eliminate the charge of negligence based upon the motorman's failure to stop the car. While this is one of the matters complained of we fail to see how the plaintiff was prejudiced by it. For we held, and so told the jury, that if they found the facts as the plaintiff alleged as to the condition of the car and that in such condition it was calculated to frighten ordinarily well carbroke horses, and thereby, without plaintiff's fault he lost control of them and suffered the accident, the defendant was liable for the damages. This certainly put less burden on him than he would have had without the amendment. If he can recover at all he ought to be as well able to recover on that basis as the other. As already noted the evidence was capable of being so construed as to make the extraordinary appearance of the car the efficient cause of the accident, but we are unable to see how that can be said of the failure to stop the car. The plaintiff says that had that been done he might have turned around and got away in the other direction. True, that is possible, but on the evidence it is the merest conjecture, having nothing to support it substantial enough to warrant a jury in so finding the fact. This point was raised in a rather exceptional manner by way of a motion at the trial to amend by putting back in the declaration the averment that at our suggestion had been eliminated. The motion was refused, and having gone to trial as the declaration then stood, it is by no means clear that plaintiff is entitled to have that question reviewed. But in view of the earnestness of counsel we have given it careful considera-

tion. The case is believed to be free from error in that regard, and if that were the only question raised we would not disturb the verdict.

It is complained, however, that the charge of the court on the subject of contributory negligence was inadequate, and we think that there is ground for that complaint. We find upon examination of the charge that the general rule was laid down putting upon the plaintiff the duty of exercising the care and skill of an ordinarily prudent and skillful driver without any qualification as applied to a position of sudden peril. The plaintiff presented no formal request for specific instruction on that point; but at the close of the charge a question was asked by one of the jurors as to whether any damages could be allowed in case plaintiff was found guilty of contributory negligence. That was answered in this way: "None at all. If he was guilty of any contributory negligence any failure to do that which a careful driver, a driver of ordinary skill and experience would have done or ought to have done under the same circumstances, then he would be guilty of contributory negligence, and if that tended in any degree to bring about the breaking of the wagon, that would be the end of the case."

Then this request was made orally by plaintiff's counsel: "It seems to me that in view of the question asked by the juror I am entitled to have the statement of the law governing the position of a man suddenly put in a place of peril and doing that which is error of judgment, which any man under the same circumstances might do without being guilty of contributory negligence."

The answer to this was: "That is what I meant when I said to the jury that if he failed to do anything which a driver of ordinary care, skill and experience would have done under the same circumstances—the circumstances comprehend the situation just as it presented itself to him there at that time. It is for you to say how much time, if any, he had to judge of what he should do when you have ascertained just what the situation was that presented itself at the time when he first saw there was any sign of fright in his team at the approach of the car."

This was clearly an inadequate statement of the law upon which counsel had asked for instruction. Technically we would have committed no error by declining to answer a request not in writing, but having undertaken to do so it should have been answered correctly and

adequately. At most the answer vaguely suggested the principle of mistaken judgment by one in a place of danger. It failed to convey the idea that in such position, if suddenly placed there without fault on his own part, he is only held to the exercise of his judgment honestly, whether it is the judgment that some other person of ordinary care and skill would exercise in the same situation or not.

The plaintiff's case may have been prejudiced by this instruction and for that reason the rule for new trial is made absolute.

*In the Court of Common Pleas No. 3, Philadelphia County, No. 95,
June Term, 1906.*

**RULES TO QUASH WRIT OF FOREIGN ATTACHMENT AND
TO DISSOLVE THE LIEN THEREOF.**

Lopez vs. Donohue.

On a rule to quash a foreign attachment upon the ground that the defendant resides within the Commonwealth, the burden of proving defendant's non-residence rests on the plaintiff.

Whether, under section 7 of the act of April 9, 1901, P. L. 617, a foreign attachment may be maintained where the defendant is within the county at the time the writ issues, not decided; though it would seem to be the better opinion that, in view of the title of the act, the jurisdiction of the courts has not been enlarged in cases where, prior to its passage, such jurisdiction had been expressly withheld.

Mr. D. R. Griffiths, Jr., for rules.

Mr. Francis X. Connolly, contra.

Opinion by Von Moschzisker, J., May 15, 1906.

In this case two rules have been taken, one to quash the writ of foreign attachment and the other to dissolve the lien thereof. The reasons urged in support of the rules are (1) that the defendant, George Harris Donohue, is a bona fide citizen and a resident of the State of Pennsylvania, residing within the City and County of Philadelphia, and was so at the time of the issuance and service of the writ of attachment; (2) that said defendant was actually and physically within the County of Philadelphia and the jurisdiction of the court at the time of the issuance and the service of the writ of attachment. An answer was filed denying the citizenship and residence of the said defendant, and depositions were taken on the petition and answer.

On consideration of the record and the depositions, the court is unable to find that the plaintiff has sustained the burden which is upon him of establishing the non-residence of the defendant. Even if the

plaintiff had been able to satisfactorily establish a case of non-residence, it is most plain that the court would be obliged to find in this case that the defendant, George Harris Donohue, was actually within the county at the time of the issuance of the writ. Although this latter conclusion of fact was not contested, yet the plaintiff contended as a matter of law that under the Act of July 9, 1901, P. L. 614, such actual presence at the time of the issuance of the writ could not have any effect upon the jurisdiction of the court in the premises. This gives rise to an interesting inquiry concerning the 7th section of that act, to wit: "A writ of foreign attachment may be served in the manner now provided by law, which attachment shall be effective, whether or not the defendant was in the Commonwealth at the time the writ was issued or served." The act in question is entitled "An act relating to the service of certain process in actions at law, and the effect thereof, and providing who shall be made parties to certain writs." Indicating the plain purpose of this act, the 17th section provides: "All Acts of Assembly and parts of acts, * * * in relation to the service of the writs hereinbefore set forth, inconsistent herewith, be and the same are hereby repealed; it being intended hereby to furnish a complete and exclusive system in itself relative to the service of all such writs." The 44th section of the Act of June 13, 1836, P. L. 568, declares that a writ of foreign attachment may be issued against the real or personal estate of any person not residing within this Commonwealth and "not being within the county within which such writ was issued at the time of the issuance thereof," and the cases, up to the time of the passage of the Act of 1901, were uniformly to the effect that the court had not jurisdiction and the writ should be quashed if the defendant was within the county at the time of the issuance of the writ.

Since the Act of 1901, in *Van Dyke vs. Macauley*, 4 Dauphin Co. Repts. 194, Judge Simonton made absolute a rule to quash a foreign attachment issued Sept. 20, 1901, where the affidavit in support of the rule made the point that the defendant was within the county at the date of the issuance of the writ. No opinion was filed. In view of the opinion of our Supreme Court as to the purpose and effect of the Act of 1901, as expressed by Mr. Justice Mitchell in *Park Brothers vs. Oil City Boiler Works*, 204 Pa. 453, where it is held that the act in question relates solely to the method of service of various writs, and that no

intent is discoverable from the title of the act to affect the jurisdiction of the courts in foreign attachments so as to give jurisdiction where, prior to that act, it was expressly withheld, to wit, where the defendant was actually within the county at the time of the issuance of the writ, for, if the act is to have that effect, we would be obliged, to us the words of Mr. Justice Mitchell, "to turn an act whose title and plain general purpose relate solely to the methods of service into one making substantial changes in the jurisdiction of the courts." The Act of March 30, 1905, P. L. 76, seems, in this respect, to put the law back to the rule, as to the defendant "not being within the county," as provided by the Act of 1836, P. L. 568. However, it is unnecessary for us to rule these points at the present time, for the reason that, in view of all the evidence and circumstances presented, it has not been shown that Philadelphia, Pennsylvania, is not the domicile of the defendant, George Harris Donohue, and consequently both rules are made absolute.

In the Court of Common Pleas of Lackawanna County, No. 1203, September Term, 1905.

EXCEPTIONS TO REPORT OF VIEWERS.

In Re. Assessment of Benefits and Damages, 12th Sewer District of Scranton, Pa.

An exception to an assessment as being too high is not well taken. The remedy is by appeal.

An ordinance must be sustained that contains the essentials of a complete ordinance for the purpose for which it was enacted.

The duties of viewers appointed under the remedial act of May 16, 1901, P. L. 71 and the act of May 16, 1891, P. L. 75 are clearly stated in the case of Omega Street, 152 Pa., 129.

Messrs. Vosburg & Dawson, for exceptants.

Mr. D. J. Davis, City Solicitor, contra.

Opinion by Kelly, A. L. J., June 29, 1906.

There are fifteen exceptions filed to the report of the viewers, but they do not all require discussion. The fifteenth has been withdrawn, the twelfth, thirteenth and fourteenth are to the effect that certain assessments are too high. This is not a proper question to raise by exceptions. The remedy is by appeal: Rodgers vs. Freemansburg Boro., 2 Pa., C. C., 518; Nohf vs. Tamaqua Boro., 14 Pa. C. C., 142; Baldwin vs. Pottstown Boro., 12 Mont. Co., 185.

The first, second and third exceptions attack the validity of the ordinance mainly on the ground that it fixed the proportion of the cost to be assessed upon the abutting property owners and the part to be paid by the city. The ordinance is certainly objectionable on that ground, but the objection is not fatal. It was specifically held by the Supreme Court, *In Re. Sewer on Wheeler Ave.*, No. 210 January Term, 1905, (not yet reported) that a similar ordinance was not invalid. Upon this question Mr. Justice Mestrezat, in his opinion, said: "We do not regard the entire ordinance as invalid. That part of the second section wherein the attempt is made to fix the amounts of the assessments was enacted without authority and cannot be sustained. It may be treated as surplusage. That part of the section and the direction to the city solicitor contained in the third section should have been omitted from the ordinance, but they do not invalidate it. The ordinance is complete without those parts and they are not so connected with the other parts as to render the whole ordinance invalid. After eliminating them, the remaining portions contain the essentials of a complete ordinance for the purpose for which it was enacted and must therefore be sustained. 21 Am. & Eng. Ency. of Law, (2d Ed.) 993." And in reversing the judgment of this court the order was: "The decree of the court below confirming the report of viewers is reversed, the proceedings subsequent to the appointment of viewers are set aside at the cost of the city, and a procedendo is awarded." So on the authority of that case we may start with the proposition that the ordinance in the case before us, while in part erroneous, is valid and sufficient to warrant the court in appointing the viewers.

The third exception cannot be sustained. The viewers were appointed as prayed for in the petitions. The prayer of the one petition was "to appoint three discreet and disinterested freeholders to ascertain and assess the costs and expenses according to the benefits to the properties by reason of the construction of said sewers, in the manner and subject to the provision of the acts of assembly in such case made and provided." The prayer of the other was the same except that they were asked to be appointed to ascertain the damages, etc.

Assuming then that the ordinance is valid and that the viewers were properly appointed the further question is did they properly per-

form their duties under the law? This is the question raised by the fourth, fifth, sixth, tenth and eleventh exceptions.

The exceptants mainly rely upon the authority of Omega Street, 152 Pa., 129, and the Wheeler Avenue sewer case above referred to. In the case of Omega Street Mr. Justice Williams, in his opinion, very clearly stated the duties of viewers appointed under the remedial act of May 16, 1901, P. L. 71. As the act of May 16, 1891, P. L. 75, substantially provides for the same duties on the part of viewers we may quote with profit some of his language. He said: "The duties of the viewers are very plainly laid down in the act authorizing their appointment. They must give notice of the time and place of their meeting for the discharge of the duties laid upon them. At the time fixed they are to go upon the premises and 'visit and personally inspect the improvements and the property supposed to be damaged or benefited thereby.' They are required to 'hear all parties interested, on all questions before them;' and, after such hearing, 'to ascertain and determine the total damages and costs and expenses of such improvement.' They are then to ascertain who has been benefited and to what extent by the improvement made, and assess, not the aggregate sum at which they have arrived, but the actual benefits accruing to each lot owner upon his lot. Whatever portion of the damages, costs and expenses may remain unprovided for by the assessment of benefits must fall upon the city. Having heard the parties fully they are to prepare their report, stating the following among other particulars: * * *" And Mr. Justice Mestrezat said in the Wheeler Avenue sewer case: "The second section of the act of 1891 requires the viewers to examine the property, to hear all the interested parties and their witnesses and to estimate and determine the damages for property taken, injured or destroyed, and to whom the same is payable, to estimate and determine the benefits which shall accrue to any property by reason of the improvement and to make report to the court 'showing the damages and benefits allowed and assessed in each case, and file therewith a plan showing the improvement, the properties taken, injured or destroyed, and the properties benefited thereby.' The eighth section of the act provides that the costs and expenses of a sewer or other improvement shall be ascertained and determined by proceedings similar to those

provided in the act in case of property taken, injured or destroyed." The decision in the latter case was that the viewers, instead of ascertaining the costs, damages and benefits in accordance with the requirements of the act, accepted the figures named in the ordinance and the estimate furnished by the city engineer.

The viewers heard evidence as to what the sewer would cost. Two expert witnesses were called, the present city engineer and the ex-city engineer. The witnesses differed very substantially in their estimates, and the viewers found the fact, upon the disputed testimony to be that the cost would be \$155,720.25, substantially the amount of the estimate of the city engineer. In other words, they credited his testimony and believed that his estimate as sworn to before them was correct, and they refused to believe that the estimate sworn to by the ex-city engineer was correct. They also found as a fact that the properties abutting on the sewer, generally speaking, were benefited to the amount of \$115,720.25 the probable cost of construction with such a trunk line as would be required to carry off the sewage from the territory involved, but they did not assess such costs upon the lots as benefits upon any mathematical calculation. In estimating the cost of the sewer with relation to the benefits they did not include the whole cost of the trunk line, but only what it would have cost if a trunk line were constructed of a sufficient size to drain the sewer contemplated only. The plans require a larger trunk line for the purpose of allowing other sewers already built to connect with it, but the viewers excluded the extra cost in assessing the benefits. They found some lots were not benefited at all and made no assessment of benefits against such lots, and they assessed different lots of the same dimensions in different sums on the ground that the amount of benefits differed as disclosed by their view by reason of the different grades of surface, etc.

The testimony of the viewers is to the effect that they heard all of the parties in interest who saw fit to appear; that in fixing the cost of the improvement they took into consideration the testimony offered by the city and the property owners; and that they viewed and examined each property affected. The fact that they saw fit to find that the city engineer's estimate was a proper one instead of finding that the estimate of the other witnesses was the proper one furnishes no argument

against their conduct. If they erred in doing so it was an error on the merits and the remedy is by appeal.

The eighth and ninth exceptions are to the effect that the actual benefits will not amount to the sum assessed. This exception raised a question of fact which we cannot pass upon here. Furthermore, if the construction of the sewer cost less than the amount estimated by the viewers the property holders will receive the benefit of the reduction pro rata.

The exceptions are dismissed and the report of viewers is confirmed finally.

In the Orphans' Court of Allegheny County, No. 233, May Term, 1905.

PETITION FOR ACCOUNT.

Jones' Estate.

The Orphans' Court has no jurisdiction to compel the executors and trustees under the will of a deceased trustee of an unliquidated trust fund, created by agreement inter vivos, to render an account of the trust unless the trust ended before or on the death of the trustee, and turned the trust fund into a debt of the decedent.

Where, by agreement inter vivos, for a valuable consideration, a settlor creates an active continuing trust in equity, and constitutes himself trustee of the trust fund, and dies without making provision for the trust by will or otherwise, the Common Pleas, and not the Orphans' Court, under section 15 of the Act of June 14, 1836, P. L. 628, has jurisdiction in equity of a proceeding to establish the trust, appoint a trustee and recover the trust fund from the estate of the deceased trustee.

Mr. H. M. Scott, for petitioners.

Messrs. George C. Wilson and W. B. Rodgers, contra.

Opinion by Miller, J., November 4, 1905.

The question of jurisdiction arises on the statements in the petition; to which answer has been made. The material allegations are as follows: That prior to December 13, 1876, McMasters, one of the petitioners, was the owner of the Eagle, now known as the Seventh Avenue Hotel, in the city of Pittsburgh, upon which property were mortgage liens aggregating about \$74,000; that he became financially embarrassed and made a voluntary assignment for the benefit of his creditors, and that proceedings to have him adjudged a bankrupt were instituted; that under these circumstances he applied for help to B. F. Jones, the decedent, whose wife was McMasters' aunt; that in May, 1877, it was agreed between Jones, McMasters, and Moses and A. C.

Silverman, who held two of the mortgages upon McMasters' property, that foreclosure proceedings should be instituted upon one of said mortgages and the property sold at sheriff's sale; that for this purpose the parties should endeavor to keep away bidders; that no defence should be made by McMasters upon these proceedings and that Jones would bid the property up to \$125,000 if necessary; that the price should be kept as low as possible, and that he, Jones, would hold in trust for McMasters the difference between what it would actually cost him and the sum of \$125,000; paying to McMasters the interest on the difference at 6 per cent. semi-annually during his lifetime, and paying the principal upon McMasters' death to McMasters' wife and children; that in pursuance of said agreement the property was put up at sheriff's sale, McMasters interposing no defence; that the proceedings in the bankrupt court were suspended or dismissed; that bidders were kept away by McMasters and the Silvermans and their friends, and that Jones purchased the property at sheriff's sale and obtained full title thereto at the final cost of \$72,459.59, leaving a difference of \$52,540.50 to be held by Jones for the benefit of McMasters in accordance with the agreement of trust, and that from the time of said sale to Jones' death in 1903, he paid or gave McMasters such sums of money as he thought McMasters actually needed, amounting to about \$900 per year, agreeing to add the balance of the annual interest to the principal, and upon McMasters' death pay the principal with the accrued interest to McMasters' children; and that no provision was made by Jones, in his will or otherwise, in relation to said trust. The prayer is that Jones' executors and trustees "be required to render an account of said trust" and "be required to forthwith pay and turn over to a trustee to be appointed for that purpose all moneys in said trust fund for the purpose of carrying out said trust." The answer denies the allegations respecting the existence of the alleged trust or trust fund, admitting that Jones gave McMasters, as benevolences, certain loans, and gifts of money, from time to time.

It is contended that Jones, as trustee for McMasters, died indebted to McMasters' trust estate, which estate as creditor is entitled to present its claim in this court and to demand payment. This could be conceded if the trust had terminated and the claim become a debt, or if

the trust were established and the trust^ee were here demanding payment of a trust fund, ear-marked.

But the allegations of the petition are, that Jones and McMasters entered into an agreement of trusteeship, and that Jones, as trustee, held in trust at the time of his death an unascertained amount of trust funds; praying that an account be rendered of said trust, and that a trustee be appointed to receive the trust fund and carry out the trust. This involves, first, the establishment of this unliquidated trust; and the appointment of a trustee; all based on agreement among the living; it involves, second, an accounting therefor.

To establish the trust disclosed in the petition and the pleadings, is within the jurisdiction of another court. This, if a trust, is *inter vivos*, and jurisdiction in relation to it under section 15 of the Act of June 14, 1836, is in the Court of Common Pleas. This is not a proceeding to compel distribution of Jones' estate among creditors, legatees, beneficiaries or next of kin; but it is to establish the existence of a continuing trust in an unascertained amount requiring an accounting; and this court, a special tribunal for specific cases, with equity powers limited to the disposition of such cases, has not the general equity powers conferred upon the Common Pleas. The petitioner does not come here as creditor, legatee or next of kin claiming distribution out of the decedent's estate; what he claims is his own alleged trust estate in his own right through a trust unascertained. "Clearly he must resort to some other forum and some other proceeding for his remedy:" *McBride's Appeal*, 72 Pa. 480, and a long line of similar cases.

The petition and exceptions must be dismissed for want of jurisdiction.

Order.—And now, to wit, November 4, 1905, this matter came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed that the within petition and exceptions filed to the account at No. 191, September Term, 1904, be dismissed at the costs of petitioner.

That judicial power to compel a plaintiff to submit to a physical examination does not exist at common law is held in *May vs. Northern P. R. Co.* (Mont.) 70 L. R. A. 111.

*In the Court of Common Pleas of Lackawanna County, No. 817,
March Term, 1906.*

RULE TO STRIKE OFF APPEAL.

Scranton Private Hospital vs. John J. Barrett, et. al.

The act or declaration relied upon to justify the court in allowing an appeal taken, after the twenty days had expired, must be unequivocal in character and well calculated to mislead a person in the exercise of ordinary discrimination.

Opinion by Newcomb, A. L. J., June, 1906.

On the face of the record the defendants' appeal in this case was taken upwards of two weeks after the time allowed by the statute for that purpose had expired. This casts upon the appellants the burden of showing that the failure to appeal in proper time was due to something said or done by either the alderman or adverse party whereby they were mislead to their prejudice. This they undertake to do by the testimony of Mrs. Barrett, the other defendant not having been called as a witness. Mrs. Barrett's testimony is controverted by that of the alderman and Mr. Andrews, the plaintiff's attorney, who was present at the trial of the suit at the alderman's office.

There is no dispute between the witnesses that Mrs. Barrett went to the office on that date in response to the summons, but not until after the expiration of the hour at which it was returnable, that she had some conversation about the case with both the alderman and Mr. Andrews; that the fact that she was late was mentioned and she accounted for it by saying her car had been delayed. Beyond that the witnesses differ as to what was said. She says the alderman told her the parties were still present and referred her to Mr. Andrews with whom she then had a conversation, which consisted of a request by him for payment of the bill in suit and her refusal, coupled with a denial of any liability on her part and a demand that payment be sought from the other defendant who alone contracted and would pay it, whereupon the attorney said "that's all right, Mrs. Barrett," and that ended the interview.

Inasmuch as nothing was said about a judgment she claims she was given the impression the case had not proceeded that far, especially in view of the alderman's remark that "as yet the parties are here."

On this showing even, though uncontradicted, we are unable to see how the appellants make good their appeal. To justify such con-

clusion the act or declaration relied upon must be unequivocal in character and well calculated to mislead a person in the exercise of ordinary discrimination. That cannot be said of the case made out by this witness. If it appeared that she had in some way made known to the alderman or the plaintiff's attorney that she was leaving the office under the impression that no judgment had been entered and they then remained silent and did nothing to disabuse her mind of the error, a different case would be presented. As it is we see nothing to make the other parties to the interview responsible for such error.

But aside from that both the alderman and Mr. Andrews emphatically testified that the case had not only been tried and disposed of before Mrs. Barrett's arrival, but that she was so told by the alderman in connection with her excuse for being late.

On the weight of the evidence, therefore, the case is against her, and the rule to strike off the appeal is made absolute.

In the Court of Common Pleas of Montgomery County, No. 85, March Term, 1904.

PETITION FOR APPOINTMENT OF VIEWERS AND FILING OF BOND.

Rickert vs. Philadelphia and Reading Railway Company.

A vendee, under articles of agreement, who has not paid the entire purchase-money and is not entitled to his deed until a future day, cannot maintain a petition for a jury of viewers to assess damages for the taking of a part of the land he has agreed to purchase by a railroad company under the Act of March 17, 1869, P. L. 12.

Messrs. J. V. Gotwalts and Henry Freedley, for plaintiff.

Messrs. Montgomery Evans and James Boyd, for defendant.

Opinion by Weand, J., September 5, 1904.

The petitioner alleged that he is the owner of land in the township of West Pottsgrove, and that the defendant company has relocated a bridge over its tracks and thereby has taken and destroyed his lands. He asks for a bond and a jury to assess damages under the Act of March 17, 1869, P. L. 12.

To this petition an answer has been filed by the defendant company, in which it denies that the petitioner has any title to the lands specified in his petition.

From the evidence it appears that John A. Selinger was the owner of the land in dispute, and on February 14, 1903, entered into an agreement of sale with Rickert for the sale and purchase thereof, title to be made on or before February 14, 1906, the purchaser to pay for the same in monthly instalments. This agreement was never recorded, nor had the defendant company any notice thereof. Plaintiff has not paid all of the purchase money, and has no deed for the premises.

John Selinger, it is claimed, agreed with the defendant company as to the location of the bridge.

It must be conceded that unless plaintiff is an owner, or person interested, within the meaning of the law, he cannot have a jury to assess damages for the taking of land under the right of eminent domain or under the Act of 1869.

Under his agreement he is but an equitable owner, not having a perfect title. If he is now given damages to the extent of the depreciation, and should default or recede from his bargain, he will be paid for what he never actually owned; and as the company has not given bond, it would be liable as a trespasser to the real owner prior or subsequent to the trespass.

Nothing is said in the agreement as to when plaintiff would be entitled to possession, and he, therefore, until he became the legal owner, would not be entitled to maintain ejectment either against Selinger or the railway company; nor could he maintain trespass, if not entitled to possession. Damages to land are to be assessed to the owner at the time of injury, being personal to the owner at that time.

The case having been submitted on petition and answer, we are of opinion that the petition must be refused.

And now, September 5, 1904, the petition is refused.

Liability upon a fidelity bond which insures against loss through the fraud or dishonesty of an agent is held, in *Orion Knitting Mills vs. United States Fidelity & G. Co.* (N. C.) 70 L. R. A. 167, not to cover failure to pay for goods purchased by a factor or broker, although the application and letter of advice stated that the applicant wished the bond to cover the liability of one who was engaged in any agency or commission business, and who desired a credit with applicant.

*In the Orphans' Court of Philadelphia County, No. 358, July Term,
1905.*

EXCEPTIONS TO ADJUDICATION.

Thompson's Estate.

Testator devised and bequeathed his estate in equal shares to his children who should be living at his death. Five years after the date of his will, he executed and delivered to J., a daughter, a deed for his dwelling-house and lot and for an adjoining lot, but instructed her not to record it until after his death. He also wrote and signed a memorandum undated, and which was found among his papers, in which, after describing the property named in the deed, he added these words: "together with the furniture therein; in consideration of one dollar and the love and esteem I have for my daughter, J., I sell to her the above described property for the above named price; to be void until my death." It was shown that, in compliance with the testator's request, immediately after the death of his wife, J., with her husband and child, had lived with the decedent during the eleven years preceding his death, and that the daughter not only gave to him her personal care, but managed all the affairs of his household. That testator knew the distinction between a gift and an advancement appeared from the fact that he had declared to a son, to whom he had given \$1,700 as an aid in business, that the money would be deducted from his share under the will. Held, that the deed to J. imported a substantive gift, and was not intended as a substitute for the gift under the will.

Mr. J. R. Embury, for exceptants.

Messrs. J. E. Sagebeer and A. E. Barnes, contra.

Opinion by Ashman, J., December 16, 1905.

The testator devised and bequeathed his estate in equal shares to his children who should be living at his death. Five years after the date of his will, he executed and delivered to Josephine Grissom, a daughter, a deed for his dwelling-house and lot and for an adjoining lot, but instructed her not to record it until after his death. He also wrote and signed a memorandum undated, and which was found among his papers, in which, after describing the property named in the deed, he added these words: "together with the furniture therein; in consideration of one dollar and the love and esteem I have for my daughter, Josephine Grissom, I sell to her the above described property for the above named price; to be void until my death." Did he intend by the deed an advancement to the daughter, and to adeem thereby the gift to her under his will? His intent, whatever it may have been, must be sought in the circumstances which attended his relations with the beneficiary. It was shown that, in compliance with the testator's request, immediately after the death of his wife, the daughter, with her

husband and child, had lived with the decedent during the eleven years preceding his death, and that the daughter not only gave to him her personal care, but managed all the affairs of his household. The testator hence had a motive which might well influence him, without any disparagement to his other children, to favor this daughter. He delivered to her a deed, absolute in its terms, under which she could have conveyed the legal title; and by that deed and the paper declaring that he had sold to her the property described therein, he recognized a debt as having been due by him to the grantee. The deed, therefore, could not operate as an ademption of the testamentary gift, which was simply of an equal share with the children to whom the testator owed nothing. The testator knew, moreover, the character and effect of an advancement, because he had declared to a son to whom he had given \$1,700 as an aid in business that the money would be deducted from the son's share under the will. The general rule is, as stated by Read, J., in *Miner vs. Atherton*, 35 Pa. 528, that a legacy by a father to his child is considered as a portion, and that if the father afterwards advances or secures a portion for the child, it is presumably an ademption, in whole or *pro tanto*, of the legacy; but that this presumption may be rebuttal by parol evidence of a different intention. We agree with the auditing judge that the proof here was that the deed to the daughter imported a substantive gift, founded upon a good consideration, and was in no way intended as a substitute for the gift under the will.

The exceptions are dismissed.

A bank which, with knowledge that a person holds negotiable paper simply as agent, discounts the paper for the agent's own benefit, relying on his statement that he has secured authority to discount the paper for himself, is held, in *Merchants' & M. Nat. Bank vs. Ohio Valley Furniture Co.* (W. Va.) 70 L. R. A. 312, to act at its peril.

A by-law of a mutual benefit society providing for the expulsion of members for defaming members of the directing council, or any member whatsoever, for reasons connected with the society, causing dissensions and disorders in the midst of the association is held, in *Del Ponte vs. Societa Italiana di Marconi* (R. I.) 70 L. R. A. 188, to be reasonable.

In the Orphans' Court of Philadelphia County, No. 400, October Term, 1905.

PETITION AND ANSWER.

Robinson's Estate.

Under the Act of May 1, 1861, P. L. 420, relative to the discharge of real estate from the lien of legacies charged thereon, the owner of the land may pay the legatee so much of the legacy as he admits to be due, and, upon paying into the Orphans' Court so much thereof as is in dispute, have a decree entered discharging his land from the lien.

Mr. J. S. Freeman, for petitioner.

Mr. Pierce Mecutchen, for respondent.

Opinion by Penrose, J., June 2, 1906.

It is admitted by the petitioner that the legacy in trust for the niece of the testator is chargeable upon the residuary real estate devised to him, and that the balance left unpaid from the personalty with interest from the expiration of a year from the date of the death is now demandable. On the other hand, it is claimed by the trustee that under the provisions of the will and the facts with regard to the relationship of the testator and beneficiary, interest runs from the date of the death. The application is by the devisee for leave to pay the whole amount, or at least so much as consists of interest, into court, in order that the lands may be discharged from the lien of the legacy.

As the person entitled is ascertained we see no reason why the admitted amount should not be paid, principal and interest, directly to the trustee, and only so much as is in dispute paid into court. The payment is intended to substitute the fund so paid for the land upon which the will charges it; and as the question involved is one of some nicety which may not be finally settled by the determination of this court, we must take care in the meantime that the interests involved are fully protected.

It has been suggested that the act of assembly permitting payment into court for the purpose of discharging real estate from the lien of legacies requires the whole amount to be so paid; but the act is to be interpreted in the light of its manifest purpose and with due regard to the rights of the parties for whom it was intended. The legatee is willing to accept the amount admitted by the devisee; and as the interests of the latter are fully protected by having what is the only subject of dis-

pute in the custody of the court so that it can be returned if the decision should ultimately be in his favor—the land in the meantime being freed from the lien, we see no reason why, as a court of equity, we should not now make a proper disposition of the case. The spirit and reason of a statute are, in all cases, to be considered rather than its precise, literal expression. The law of Bologne, as we are told by Blackstone, which punished with death the letting of blood in the streets, was held “after long debate”—the necessity for which it is difficult now to understand—not to “extend to the case of a surgeon who opened the vein of a person that fell in the street with a fit;” and the very definition of equity as applied to the interpretation of statutes is the correction of the law wherein by reason of its universality it is deficient.

Upon payment into court of the interest for the year immediately succeeding the death of the testator, \$600, and the further payment to the trustee for the legatee of the balance of principal with interest from the expiration of a year from such death, the residuary real estate will be freed and discharged from the lien of the legacy.

Counsel will prepare the necessary decree.

In the Court of Quarter Sessions of Lehigh County.

PETITION FOR REVOCATION OF BREWER'S LICENSE.

In Re. Lieberman's Sons' License.

The fact that a brewer bottles his own beer in a building acquired by him for that purpose, which adjoins the vrewery and is used by him, not as a separate plant, but in connection with the brewery, is not such a violation of law as to justify a revocation of his license.
United States Revised Statutes, Sec. 3354, considered.

Mr. Calvin E. Arner, for petitioner.

Messrs. Dillinger & Schwartz, for respondents.

Opinion by Trexler, P. J., November 21, 1905.

On March 7, 1905, a brewer's license was granted to Joseph Lieberman's Sons for the premises described as the Eagle Brewery, at the northwest corner of Sixth and Union streets, in the City of Allentown.

On July 3, 1905, a petition was presented by Malcolm W. Gross, asking that the license be revoked for the reason that since the granting of the license, the licensees had acquired property No. 130 South Sixth street which, it appears, adjoins the property of the licensees to the

north, and that said property so acquired was used in connection with their brewing establishment, contrary to law.

In answer to the petition, the licensees admit that they did acquire said additional property, but that they acquired said additional property exclusively for the bottling of beer manufactured by them at the brewery, and that in so doing they wished to comply with the United States Internal Revenue Laws, Revised Statutes, Sec. 3354.

The United States statute provides: "That any person carrying on the business of bottling fermented liquor in any place or brewery in which fermented liquor is made, or upon any premises having communication with such brewery, shall be liable to a fine of \$500, and the property used in such bottling or business shall be liable to forfeiture: Provided, however, that this section shall not be construed to prevent the withdrawal or transfer of fermented liquors from any of the vats in the brewery, by way of pipe line or other conduit, to another building or place for the sole purpose of bottling the same."

Under our state laws, a brewer has a right to bottle his own beer and dispose of it from the brewery under the regulations provided by the Act of Assembly.

The licensees, in this sense, were either compelled to violate the United States laws by bottling beer in the brewery, or, if the contention of the petitioner is correct, were liable to indictment if they bottled upon adjoining premises.

It will be noticed that the description in the application for license covers not only the premises as they existed at the issuing of the license, but the additional property purchased.

The point of law involved is one not easy of solution, and I do not think that the method employed is the best one to secure the end in view. A license should only be revoked for clear violation of the Act of Assembly. The revocation of the license would put the brewer out of business summarily, and this extreme course, as I stated above, should not be taken unless the violation of the law is clear.

Is the acquiring of additional property adjacent to the brewery, not to be used as a separate plant, but only in connection with the one already in operation, a violation of law?

If the description in the license determines the extent of the brew-

ery and all the processes of the manufacture must be accomplished within the circumscribed area, then the result would be that no brewer could bottle his own beer without rendering himself liable to the penalties prescribed by the United States laws. I apprehend, however, that, under the United States laws, what is meant by brewery has no relation to the description of the license as granted by the state courts. By a brewery is meant the building where the beer is manufactured. It may be possible a brewer could comply with both laws by having in the description of his brewery sufficient ground to also include a bottling establishment with an intervening thoroughfare, as provided by the regulations of the Internal Revenue Department.

The matter, however, in my view, should be raised in a proceeding for the violation of the liquor laws.

The state courts would hardly license a retailer whose establishment is divided by a thoroughfare and permit him to sell on both sides of the street. In the case of a brewer, it might be different, as the two kinds of business are in their nature essentially different.

Now, November 21, 1905, rule discharged.

A notorial notice of protest of nonpayment of a note, addressed to an indorser as if living when he is dead, is held, in *Bank of Ravenswood vs. Wetzel* (W. Va.) 70 L. R. A. 305, to be good to charge such indorser's estate if actually received by his administrator.

An undertaking by a ticket agent, upon receiving money to pay the passage of a third person from a point on another road to the point where the money is received, that he will instruct the initial carrier to deliver a ticket to the intending passenger, is held, in *Brezewitz vs. St. Louis, I. M. & S. R. Co.* (Ark.) 70 L. R. A. 212, not to render his employer liable for delay of the initial carrier in complying with the instructions.

The law of comity is held in *J. A. Holshouser Co. vs. Gold Hill Copper Co.* (N. C.) 70 L. R. A. 183, not to require the courts of one state, which are administering the assets of an insolvent foreign corporation, to give effect to a statute of its domicile imposing a license tax upon it, and making the tax a preferred debt in case of insolvency.

*In the Orphans' Court of Philadelphia County, No. 355, October Term,
1905.*

EXCEPTIONS TO ADJUDICATION.

Gibbons' Estate.

Where an accountant claims to set off and deduct from a legacy a certain amount which the legatee received from the testatrix prior to her death, and the only proof of the receipt of the money is derived from the legatee's admission to himself, after the death of testatrix, that she received the money with instructions from testatrix as to the manner in which she should expend it, and that she expended almost the entire sum as she was directed, the admission of the receipt of the money must be taken in connection with the declaration as to its disbursement.

The receipt of the money by the legatee being conceded and its expenditure being in every respect in accordance with a probable request and direction by testatrix, and there being also no countervailing testimony produced by the residuary legatee, a mere question of fact arises for determination by the auditing judge, and his conclusion, unless clear error be shown, is final.

Testatrix, within a few days of the execution of her will, withdrew a sum of money, which she directed to be expended for her funeral and interment. Her entire estate, after deducting this amount, consisted of personalty amounting to \$100, and a small house and lot worth \$3200. She directed her executor to pay all her just debts and funeral expenses, and bequeathed pecuniary legacies aggregating \$3200. She then provided: "All the rest, residue and remainder of my estate, whether real, personal or mixed, and wheresoever situate, I give, devise and bequeath unto the said Joseph Reiley, his heirs, executors, administrators and assigns, absolutely and in fee simple. I hereby make, constitute and appoint the said Joseph Reiley executor of this my last will and testament, hereby authorizing and empowering him, my said executor, to sell any and all of my said real estate, at either public or private sale, for the best price that can be obtained for the same, and to make good and valid deeds therefor, without the purchasers thereof being in any way liable for the application of the purchase money." Held, the will did not work a conversion.

Ashman, J., dissents.

Mr. E. Spencer Miller, for accountant and exceptant.

Mr. J. Washington Logue, contra.

Opinion by Hanna, P. J., June 2, 1906.

The first exception relates to a claim by the accountant and residuary legatee to set off and deduct from a legacy a certain amount which the legatee received from the testatrix prior to her death. As far as we can ascertain from the testimony, the only proof of the receipt of the money by the legatee is derived from her admission to the accountant, after the death of the testatrix, that she received the money accompanied with instructions from testatrix as to the manner in which she should expend it and with the declaration that she expended almost the

entire sum as she was directed by the testatrix. The legatee very naturally objected to the deduction from the amount of her legacy. As the moneys expended by her were for the payment of funeral expenses, etc., and therefor in relief of the residuary legatee, he could not with propriety object to the expenditures, and accordingly withdrew his claim to deduct the amount thereof from the legacy with the single exception, to wit, a sum paid for religious services at the funeral obsequies of the testatrix. This appeared to be mainly for the reason that she bequeathed a legacy for similar religious services to be solemnized after her death.

But a further objection was insisted upon, to wit, that the legatee was incompetent to testify concerning the instructions given to her by testatrix. It is true, under ordinary circumstances, she cannot thus avoid the responsibility of accounting for the money she received from testatrix. But the legatee is competent to testify as to what occurred between herself and the accountant after the death. And if she is to be held liable by reason of her admission, her entire admission, accompanied with her declaration made at the time of the manner in which she expended the money and that it was in pursuance of directions given her by testatrix, is also to be considered as evidence before the auditing judge. The declaration to the legatee is part of the *res gestae*: 2 Wharton's Evidence, Sec. 1102; Com. vs. Wertz, 161 Pa. 591.

And the whole of the admission must be taken together; but this rule does not apply when the circumstances render it improbable that it is said in avoidance of a conceded fact: Robert's Appeal, 126 Pa. 102; Newman vs. Bradley, 1 Dall. 240.

In this case, the receipt of the money is a conceded fact, and the expenditure of the money was in every respect in accordance with a probable request and direction by testatrix. There is, moreover, no countervailing testimony produced by the residuary legatee. Thus a mere question of fact arises for determination by the auditing judge. He has found the legatee properly accounted for the money excepting a trifling balance, and only to this extent diminishes her legacy. As no clear error is shown in this conclusion, the exception thereto is dismissed: O'Mara's Estate, 14 District Reps. 259; Shoenberger's Estate, 211 Pa. 99. And many other cases which might be cited.

The second exception to the allowance of interest upon the pecuniary legacies was withdrawn.

The third exception, however, was insisted upon. In the present case, the personal estate was trifling in amount. The testatrix was the owner of a small dwelling house. By her will she bequeathed a number of pecuniary legacies and the residue of her estate to her executor with full power of sale of her real estate. After the death of testatrix, and until the sale of the real estate, the executor assumed charge thereof, obtained tenants, collected the rents, paid the taxes, etc., and at the audit of his account he had retained for his own use a balance amounting to \$275. It was claimed he should be surcharged therewith upon the ground that the moneys thus received should be accounted for by him and applied towards the payment of debts and legacies. This view was adopted by the auditing judge, and the accountant was surcharged with above balance realized from the rents of the real estate. If an equitable conversion was intended by the testatrix from the date of her death the case will be different, but it will be seen, upon examination of the will, there is a mere authority to sell, and the legacies are, by operation of law, charged upon the real estate. A bare power of sale, like a discretionary power, does not work a conversion until exercised: *Peterson's Appeal*, 88 Pa. 397; *Sheridan vs. Sheridan*, 136 Pa. 14; *Darlington vs. Darlington*, 160 Pa. 65.

As we have stated, the executor is the residuary legatee and devisee. He is, therefore, entitled to the rents from the real estate until its sale. This is distinctly held in *Watt's Estate*, *Pennsylvania Co.'s Appeal*, 168 Pa. 431, where the question was further discussed by Williams, J., saying: "In such a case, the executor has no authority to collect the rents accruing from the residuary real estate and to use them as assets of the testator's estate." See, also, *Miller's Estate*, No. 2, 4 District Reps. 408.

This exception must be accordingly sustained, and the adjudication will be corrected in accordance herewith.

A final decree, with schedule of distribution, will be prepared by counsel for accountant.

In the Orphans' Court of Philadelphia County, No. 383, January Term, 1906.

EXCEPTIONS TO ADJUDICATION.

Norris' Estate.

Testator's will was in two parts, one disposing of his personal estate and the other of his real estate. At the beginning of his will he said: "I give and bequeath the following legacies," followed by the gift of various sums of money to several legatees, including \$200,000 to each of his two sisters. A large amount of his personal estate remained undisposed of, and, as to this, he provided: "The residue of my personal estate I give and bequeath to my sisters, Sarah * * * and Emily * * * ." He also directed his executors to pay all of the above legacies clear of tax, which clause was followed immediately by certain devises of real estate. Testator's sister Sarah died May 19, 1899, and on July 27, 1899, he executed a codicil, in which he said: "I give and bequeath to the daughters of my sister Sallie N. Pepper, the legacy which I had left her, share and share alike." His remaining sister, Emily, died August 6, 1901, whereupon he made a second codicil as follows: "I give and bequeath to my nieces, Sarah and Elizabeth, and to my grandnephew the legacy which I had left to my sister, Emily, share and share alike." Held, per Hanna, P. J., and Ashman, J., that the word "legacy," as used in the codicils, included the pecuniary legacies of \$200,000 only, and that, as to the residue of personalty bequeathed to his sisters, testator died intestate; but, per Penrose and Dallett, JJ., that the word "legacy" included both the \$200,000 pecuniary legacies and the residue.

Messrs. Charles H. Downing and John J. Ridgway, for accountants.

Mr. George Wharton Pepper, for exceptants.

Opinion by Hanna, P. J., June 12, 1906.

The question suggested by these exceptions is the proper interpretation to be placed upon the word "legacy," employed by testator in two codicils to his will. The will and codicils are evidently holographic, yet testator was well versed in the use of technical legal words and phrases.

At the outstart of his will he says, "I give and bequeath the following legacies," and proceeds to bestow large gifts of money to a number of his kindred, also in charity, and to an esteemed personal friend.

It is needless to say he fully understood the meaning of the word "legacy." The persons whom he intended first to recognize and benefit were his two sisters, Sarah and Emily, to each of whom he gave the sum of \$200,000.

His first named sister was married and had children, while the last named was unmarried. Both were living at the date of the will. But

on May 19, 1899; testator's sister, Sarah, died, and on July 27, 1899, he executed a codicil, by which he gave and bequeathed as follows: "To the daughters of my sister, Sallie, the legacy which I had left to her, share and share alike." His sister left three daughters surviving her, who were living at the date of the codicil, and still living. There is, therefore, no difficulty in determining that they are entitled in equal shares to the legacy bequeathed to their mother.

Emily, the remaining sister of testator, died on August 6, 1901, whereupon, on August 29, 1901, he made a second codicil as follows: "I give and bequeath to my nieces, Sarah and Elizabeth, and to my grand-nephew the legacy which I had left to my sister, Emily, share and share alike." There is no ambiguity here, and beyond doubt the three persons named are entitled in equal shares to the legacy bequeathed to testator's sister, Emily, of \$200,000.

But these provisions are not alone before us. Testator did not dispose of his entire estate in pecuniary gifts; a large amount remained undisposed of, and also aware of the legal meaning of the language he used, this he designated as the "residue," and gave and bequeathed the same to his before named sisters, Sarah and Emily. As already stated, both predeceased him.

And now upon the distribution of his residuary personal estate arises the difference of opinion as to the meaning of the word "legacy."

It seems to be conceded the gift of \$200,000 and one-half part of the residue should be awarded to the three daughters of testator's sister, Sarah. This admits the correctness of the position assumed by the three legatees named in the second codicil, viz., that the term "legacy" embraces not only the pecuniary gift of \$200,000, but one-half of the residuary estate. It is, however, contended that they are entitled to the pecuniary legacy of said sum of \$200,000 only, and testator died intestate as to the remaining one-half part of the residue.

As frequently held, it is not so much the intention of testator that is the subject of inquiry, but the meaning of the words he employs to indicate his intention.

After a careful consideration of the will and codicils, it seems, when testator used the word "legacy" in both, he contemplated merely that the legatees named in the codicils should take only the sum of

\$200,000, for this is the only amount he designates as the legacy he gave to each of his two sisters. He made no disposition of the residuary amount of his estate. And as he must be presumed to know that as an undisposed of portion of a residue cannot lapse into a residue, there being none, in such event, the portion of his estate he failed to dispose of will go, not to residuary legatees, but to his heirs and next of kin as if he died intestate.

It would seem, therefore, that a share of the residue should not be embraced within the meaning of the word "legacy," as shown by the cases referred to by the auditing judge. In *Quincy vs. Rogers*, 9 Cush. 291, Shaw, C. J., said: "In common parlance and in a more precise use of language, a legacy is distinguishable from the gift of a residue or a share in the residue." In *Ward vs. Grey*, 26 Beav. 485, Sir John Romilly, M. R., said: "A residue is not a legacy in the ordinary sense of the term." In *Layborn vs. Wright*, L. R. (1894), 1 Ch. 303, it was said: "It is doing violence to language to describe a share of residue as a pecuniary legacy."

And again, quoting the auditing judge: "So as to the relative force of the presumption against intestacy, and that against the disinheritance of heirs, it was said in *Espy's Estate*, 207 Pa. 459: 'The legal presumption that the testator did not intend to die intestate is fully met and satisfactorily answered by another presumption of like force and effect, that the heir is never to be disinherited except by plain words or necessary implication,' and in *Smith's Appeal*, 23 Pa. 9, 'In cases of doubtful construction the law leans in favor of a distribution as nearly conformed to the general rules of inheritance as possible.' The same language is found in *Bruckman's Estate*, 105 Pa. 363."

For the reasons mentioned it would seem the proper conclusion is to hold that testator died intestate as to one-half of the residue of his estate, as held by the auditing judge, and the same should be awarded to his heirs and next of kin; but the court being evenly divided in opinion, the exceptions must be dismissed, and the adjudication confirmed.

Ashman, J., concurs.

Penrose, J., June 12, 1906.—It is a principle of interpretation so well settled as not to require reference to decisions that a construction which leads to an intestacy will never be adopted where the words of

the will, understood in the light of surrounding circumstances, though technically inaccurate, are sufficiently broad to include the entire estate: See *Miller's Appeal*, 3 *Amerm.* 459; *Appeal of Board of Missions*, 10 *Norris*, 507. Of course, in such cases the heir or next of kin is excluded; but this is not in conflict with the maxim that the heir shall not be disinherited except by express words or necessary implication, and that all doubts will be resolved in his favor: it is simply a finding that the will—whose natural purpose is to defeat the operation of the intestate laws—does, when properly construed, exclude him, and that the case is free from reasonable doubt. The maxim, it may be remarked, will be found, on examination of the cases, to have been applied only where the will contains no disposition, in words, of the residuary estate, and where it has been sought to infer such disposition from some provision of which it was not the necessary consequence. This is noticeably the case in *Espy's Estate*, 207 *Pa.* 459, cited in support of the assertion of intestacy in the present case, as it is also in *Bender vs. Dietrick*, 7 *W. & S.* 284, and in *Hitchcock vs. Hitchcock*, 11 *Casey*, 393, and, it is believed, in the cases generally which have been cited.

But this testator excluded his heirs and next of kin, as such, in the most explicit terms. Under the intestate laws the estate would have gone to his two sisters and about fifty nephews and nieces and great-nephews and nieces; but by his will he selected the sisters and comparatively few of the others—giving to the sisters \$200,000 each, and the residue, after gifts of various amounts to the other legatees, to them in equal shares. The will, drawn by himself, was executed in April, 1891.

In May, 1899, Mrs. Pepper, one of the sisters, died, leaving three daughters; and in July, two months later, he executed a codicil, also drawn by himself, in which he said: "I give and bequeath to the daughters of my sister, Sallie N. Pepper, the legacy which I had left to her, share and share alike."

It is contended that this is to be read as if he had said, not the "legacy," but the "pecuniary legacy" which I had left to her—thus excluding, as a matter of construction and under the case cited on behalf of the next of kin (*Layborn vs. Wright*, *L. R.* (1894), 1 *Ch.* 303), the residuary legacy and causing as to the sister's share of it an intestacy. There is no right under the general principles of interpretation, and still

less under the peculiar phraseology of this will, to make the interpolation suggested. What the testator has said is not pecuniary legacy, but legacy, the legacy—used in its broadest sense and including therefore, as the case also cited on behalf of the next of kin shows, a residuary legacy no less than a pecuniary legacy: *Ward vs. Grey*, 26 Beav. 485. This is obvious. A legacy in the strictest, most technical sense of the word, is any testamentary gift of personal estate—as contradistinguished from devise or gift of real estate—a distinction which may, perhaps, not be without significance in the consideration of this case. It is the generic term, of which the sub-divisions are pecuniary legacies, demonstrative, specific and residuary legacies.

The will clearly shows that he used the word in its general sense. It consists of two parts; one disposing of his personal estate; the other, of his real estate. The word legacies occurs in the beginning of the will and also at its conclusion, and only there. The language used is "I give and bequeath the *following* legacies;" after which are given various sums of money to the persons mentioned, including the two sisters who are to receive \$200,000 each, and ending with a gift to the sisters as follows:

"The residue of my personal estate I give and bequeath to my sisters, Sarah * * * and Emily." * * *

All of this precedes the final provision as to the personal estate, in which the gifts are *all* referred to as "legacies:" "I direct my executors to pay *all* of the above legacies clear of tax;" this being followed, immediately, by the part of the will disposing of the real estate. It was quite natural, therefore, in writing the codicil that the testator should speak of what he had given to his sister as—"the legacy which I had left to her,"—meaning all that she would have taken had she survived him—especially as at the date of the codicil the estate was or had become very large, so that the residuary share of the sister who had died greatly exceeded the amount of her pecuniary legacy which would merge into it and present itself to his mind in this shape.

But after all, the precise, literal language of a testator is not of much importance in ascertaining his intention; and a much more significant and convincing argument is furnished by the statute with regard

to legacies to brothers and sisters of a testator who die in his lifetime leaving children.

The Act of May 6, 1844, P. L. 564, provides that "No devise or *legacy* hereafter made in favor of a brother or sister * * * of the testator, such testator not leaving any lineal descendants, shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, saving always to every testator the right to direct otherwise." This act had been on the statute book for sixty years when the codicil in question was written, and its existence, of course, was not only presumptively but actually known to the testator—a man of experience and familiar with all matters relating to estates. He well knew that what he had given to his sister would, without anything being done by him, go to her children; but he evidently wished to show that his intentions were in accordance with the provisions of the act: and so, using almost the very terms of the act, he declared that the "legacy" which he had given to their mother should go to her daughters—who were all of her children.

In answer to this it is solemnly argued that while he knew the "legacy," that is, the entire testamentary gift, would go to the sister's children, his intention was that the gift by the codicil should be confined to the pecuniary legacy, and, for some inscrutable reason, that the residuary legacy, separated from the rest of the original gift, should go to them under the Act of Assembly. The law will not thus attribute to an intelligent testator a senseless act of folly, even to let in the heir whom it favors, but whom the testator, himself, had theretofore so effectually excluded.

This seems to demonstrate the sense in which the testator intended the words "the legacy which I had left" to be understood; and as precisely the same form of expression is used in the second codicil, executed in August, 1901, three weeks after the death of his other sister, leaving no children, it must be held that it, too, effectually disposed of all that was given to her by the will, and that it passes the residuary share,

no less than the amount of the pecuniary legacy, to the three persons whom it substitutes in her place.

The principle that a codicil only changes a will to the extent which it clearly indicates is well settled, but it can have no application to a testamentary disposition which has utterly failed by reason of the death of the legatee in the testator's lifetime, and the codicil is executed for the very purpose of preventing a lapse or failure of effectual disposition. Even then, however, it is equally well settled that the codicil is to be so interpreted as to make it accord with the general scheme of the will; and in the present case that scheme was to dispose of the entire estate, so that no part should pass under the intestate laws.

It follows that the exceptions to the adjudication should be sustained, and the entire share of the estate given to the sister by the will awarded to the persons named in the codicil of 1901.

Dallett, J., concurs.

In the Orphans' Court of Philadelphia County, No. 252, April Term, 1901.

PETITION BY FATHER OF MINORS, DIRECTED TO THE EXECUTOR TO PAY TO HIM THE ENTIRE INCOME ACCRUING FROM A CERTAIN SUM OF \$5000 FOR THE MAINTENANCE, SUPPORT AND EDUCATION OF THE SAID MINORS, AND ANSWER THERETO.

Bowen's Estate.

Testator provided, inter alia, "I direct the executor of this my will to safely invest the sum of \$5000 in good and secure corporate bonds, yielding at least 4½ per centum annually, and pay the aforesaid interest of 4½ per cent, after dividing the same into equal parts, to my second cousins (naming them) until they reach the age of eighteen years or die before eighteen years of age, after which time I direct that the \$5000 invested as aforesaid shall go to the residuary legatee of this my will forever, she to have full control, use and title to the same." Held, that the trust continued as to the entire principal until the youngest minor attained eighteen, and no part of the income should be paid meanwhile to the residuary legatee.

Mr. Edward Brooks, Jr., for petitioner.

Mr. T. H. Walnut, for respondent.

Opinion by Dallett, J., June 2, 1906.

By his will, Edward A. Bowen, who died January 11, 1901, provided as follows: "(2) I direct the executor of this my will to safely invest the sum of \$5000 in good and secure corporate bonds, yielding at

least $4\frac{1}{2}$ per centum annually, and pay the aforesaid interest of $4\frac{1}{2}$ per cent., after dividing the same into equal parts, to my second cousins, Marguerite Lee Kirby, Jennie Kirby, Mary Kirby and William B. Kirby, Jr., until they reach the age of eighteen years or die before eighteen years of age, after which time I direct that the \$5000 invested as aforesaid shall go to the residuary legatee of this my will forever, she to have full control, use and title to the same."

Jennie Kirby attained the age of eighteen years on January 25, 1906.

The petitioner, the father of the four minors named in testator's will, and to whom by decree of this court entered May 4, 1901, it was directed that the income to be derived from the fund of \$5000 be paid for their support, maintenance and education, asks that the executor be directed to pay over to him the entire accrued income from said fund, less proper costs and charges.

In her answer, testator's mother, the residuary legatee under his will, avers that she is advised and believes that one-fourth of the income, as well as one-fourth of the principal of the said fund of \$5000, is now payable to her.

In his answer, the executor acknowledges the receipt of notice to this effect from the residuary legatee, and submits himself to such order as the court may make.

The question presented, therefore, is whether the three minors who have not yet reached the age of eighteen years are or are not entitled to the entire income derived from this fund.

No question as to the propriety of the order made May 4, 1901, is now before us, and notwithstanding the fact that it is the duty of a father to maintain and educate his minor children, we must presume that it was made upon the presentation of sufficient and good reasons why it should be made.

We believe that the prayer of this petition should be granted. Under any interpretation of the testator's will, this trust must be continued as to the entire principal until the youngest minor reaches the age of eighteen years, for the gift of a share of income is regarded as more desirable than the gift of the income to be derived from a share

of the principal: Wilen's Appeal, 105 Pa. 121; Aubert's Appeal, 119 Pa. 48; McCallum's Estate, 211 Pa. 205.

Conceding that the Act of March 31, 1812, 5 Sm. Laws, 395, took away survivorship as an incident of joint tenancy, it may still result as a necessary implication from the will (Arnold vs. Jack, 24 Pa. 57; Jones vs. Cable, 114 Pa. 586; Sturm vs. Sawyer, 2 Pa. Superior Ct. 254), and in construing a testator's words, a distinction has been made between cases in which subsequent interests are given to representatives of the first takers, when it has been held that no survivorship is intended and cases in which there is no connection or relationship between the first takers and the remaindermen where survivorship is to be implied: Erwin's Estate, 5 Montg. Co. Law Repr. 18, citing Loring vs. Coolidge, 99 Mass. 191, and Pennsylvania Co.'s Appeal, 20 W. N. C. 41.

The residuary legatee in this case takes entirely independent of and not as a representative of the first takers.

But even without regard to this distinction, we think that in this case the testator's intention as to the disposition of this income may be safely inferred from his words in disposing of the principal of the fund. He has given the income, after its division into equal parts, to the four minors, his second cousins, by name, "until they reach the age of eighteen years or die before eighteen years of age, *after which time*" he directs "that the \$5000 invested as aforesaid shall go to the residuary legatee of this my will forever, etc." It is clear that there is no time at which the principal of this fund of \$5000 may go to the residuary legatee until the youngest minor has reached the age of eighteen years, and, from his evident postponement of the distribution of the principal and failure to direct any other than the original distribution of the income, the implication that he intended to dispose of all the income until that time naturally follows: McCallum's Estate, 211 Pa. 205.

The prayer of the petition is granted.

Failure to equip a train with tools usually carried by trains for emergency use in case of a wreck, for want of which a passenger is not rescued as promptly from his position in the debris of a wreck, is held, in Jackson vs. Natchez & W. R. Co. (La.) 70 L. R. A. 294, to render the carrier liable in damages for such additional suffering, regardless of whether the wreck itself was or was not caused by its negligence.

*In the Orphans' Court of Philadelphia County, No. 464, January Term,
1906.*

PETITION FOR PARTITION.

Spielman's Estate.

A power vested in the executors to sell the real estate in the exercise of a sound discretion does not work a conversion, nor will a blended gift of realty and personalty, if immediately followed by a direction to divide the realty and convey the several shares to the devisees.

Testator provided in his will, "I give, devise and bequeath all the rents, interest and income of all my estate, real, personal and mixed, including the use of all my household goods, plate, furniture and other personalty, etc., to my beloved wife during all the term of her life. The corpus or principal, however, to be at her absolute disposal, should she require it, without any liability or control * * * ." He then empowered his executor, "in a wise and sound discretion, to sell all or any part of my real estate either at public or private sale, whenever advantageous so to do, for the payment of my debts or division of my estate or otherwise, and to extinguish any ground rent, and to make a good and sufficient deed and deeds of said realty, etc., to the purchasers or purchaser thereof in fee simple or otherwise without any liability on the part of the purchasers or purchaser thereof to see to the application of the purchase money, and clear of all trusts, and after the decease of my said wife, that an amicable division of my estate and realty be made, and for so doing that a fair and just appraisalment of my real estate be made by three disinterested appraisers to be appointed by my executrix, and the several shares to be conveyed by her in severalty in fee to each for his or her portion of my said estate."

Mr. A. T. Johnson, for petitioner.

Mr. John O. Bowman, for respondent.

Opinion by Ashman, J., June 9, 1906.

The testator's will contained a gift of the income of his estate, real and personal, to his wife for life, but provided that the principal should be at her absolute disposal, without any liability or control, if she should require it. At her death it gave the estate in equal shares to the children, one share, however, to be held in trust for the separate use of one of the daughters; and it empowered the executrix to sell the realty or any part thereof for payment of debts or the division of the estate. It provided, further, "after the decease of my said wife, that an amicable division of my estate and realty be made, and for so doing that a fair and just appraisalment of my real estate be made by three disinterested appraisers to be appointed by my executrix, and the several shares to be conveyed by her in severalty in fee to each for his or her portion of my said estate." After the death of the widow, the executrix caused the real estate to be appraised by three appraisers, who divided the same

into purparts and awarded them to the devisees. The devisees refused to accept the same, and were unable to agree upon an amicable division of the estate. The petitioner, one of the heirs and devisees, thereupon applied for an inquest in partition.

We can see no force in the contention that the will worked or intended to work a conversion. The power to sell was left to the wise and sound discretion of the executrix, and was therefore as far removed as possible from a direction to sell. The blended gift of realty and personalty did not indicate that the testator regarded his estate as personalty, because it was immediately followed by the direction to divide the real estate, and to convey the several shares to his children. In *Keim's Estate*, 201 Pa. 609, which was cited as on all fours with the present, the intent to convert was found in the direction that \$85,000 should be deducted from the share of one of the children, and this, of itself, the court held, necessitated a sale. The pieces of real estate embraced in the present will numbered forty-five, and the devisees numbered six; and the direction that the properties were to be appraised and conveyed in severalty to the children, and as to one of them to be held in trust, was a plain expression of intent on the part of the testator that they were to be divided as real estate. The testator having thus prescribed the method by which to effect the division of his estate, the devisees are bound to follow it, as they would any other valid provision of his will.

The petition for partition is dismissed.

A fence $4\frac{1}{2}$ feet high around a water-supply reservoir in a public park, which is constructed so that children have to remove their shoes to climb it, is held, in *Carey vs. Kansas City (Mo.)* 70 L. R. A. 65, to be sufficient to absolve the municipality from liability for the death, by drowning in the reservoir, of a child eleven years old, who has been warned by public watchmen not to go inside the inclosure, and driven out of it.

The fact that building materials lying in the street may be so arranged as to be attractive to children as a place for play, or as a resting place during or after play, is held, in *Friedman vs. Snare & T. Co. (N. J. L.)* 70 L. R. A. 147, not to impose upon the landowner the duty so to arrange and maintain the materials as to render them safe for such use.

*In the Court of Common Pleas No. 3, of Philadelphia County, No. 3272,
March Term, 1906.*

**RULE TO SHOW CAUSE WHY SHERIFF SHOULD NOT
PROCEED WITH THE EXECUTION OF THE WRIT OF
FI. FA. UNLESS THE CLAIMANT PAY THE \$4 AP-
PRASEMENT.**

The Fiegenbaum & Gottlieb Company vs. O'Mara.

Under the Act of May 26, 1897, Sec. 7, P. L. 95, providing for the payment of a \$4 appraisement fee in a sheriff's interpleader, the fee must be paid by the claimant, if the goods are found in the possession of the defendant at the time of the levy; but by the plaintiff in the execution, if they are found in the possession of some other person. Where the goods are found in the house of the defendant and it is averred in the answer to a rule by the plaintiff upon the sheriff to proceed with the execution unless the claimant pay him the fee, that the claimant lives at that house and that the goods were found in his possession, so far as they could be under the circumstances, the plaintiff in the execution must pay the fee unless such answer is overcome by proof to the contrary.

Mr. Gustave L. Blieden, for rule.

Mr. George S. Russell, contra.

Opinion by Von Moschzisker, J., June 15, 1906.

In this case a levy was made upon certain goods as the chattels of the defendant. These goods were claimed by one John O'Mara. The goods in question were found at No. 916 North Front street, Philadelphia, which is the residence of the defendant, Mrs. B. O'Mara, and where her son, John O'Mara, the claimant, also resides. Upon the claim of John O'Mara being made, the sheriff demanded of the plaintiff the sum of \$4 for appraising the goods and chattels before taking a rule for an interpleader to settle the question of the title to the goods; whereupon the plaintiff entered a rule upon the sheriff to show cause why he should not proceed with the execution of the writ of *fi. fa.* unless the claimant pay to the sheriff the \$4 appraisement fee. In support of this rule, the plaintiff avers that the goods and chattels in question belong to and were at the time of the levy in the possession of the defendant. The sheriff has filed an answer, in which he avers that, so far as deponent can ascertain, "the goods were as much in the possession of the claimant as they could be in the possession of one living in the house of another."

The Act of May 26, 1897, Sec. 7, P. L. 95, provides: The cost of making an appraisement of said goods and chattels shall be the sum of

\$4, which shall form part of the costs of the cause, and shall be paid by the claimant at the time of making his claims, if the defendant in the execution shall be found in possession of said goods and chattels, and by the plaintiff in the execution if some other person be found in possession thereof." We construe this to mean that if the goods are found in the possession of the defendant at the time of the levy, the claimant must pay the \$4 appraisalment fee, but if the goods are found in the possession of some other person, and that other person may be the claimant himself, then the plaintiff in the execution must pay the appraisalment fee; and in a case like the present, where the goods are found in the house of the defendant, and it is averred in the answer to the rule on the sheriff that the claimant lives at that house and that the goods were found in his possession, so far as they could be under the circumstances, if such answer is not overcome by proof to the contrary, then the plaintiff in the execution must pay the appraisalment fee.

The rule is discharged.

In the Orphans' Court of Philadelphia County, No. 734, April Term, 1905.

EXCEPTIONS TO ADJUDICATION.

May's Estate.

Where a decedent in his lifetime purchased property under and subject to a mortgage, and, after his death, his executors default in the payment of interest, whereupon the mortgage is foreclosed, and, under an arrangement entered into between the original mortgagor, decedent's vendor, and the holders of the mortgage, the property is purchased, in the absence of other bidders, by the former for a sum less than the amount of the mortgage, he paying to them the difference, together with interest and costs, the sum he so paid can be recovered by him from decedent's estate.

Mr. W. E. Caveny, for exceptant.

Mr. George P. Rich, contra.

Opinion by Penrose, J., June 30, 1906.

Claimant, being the owner of certain premises, mortgaged them in the sum of \$8,000. He subsequently sold the property to the decedent under and subject to the mortgage. The decedent owned the property until his death, which occurred in May, 1904. After his death, default was made in the payment of interest, and the mortgage foreclosed, judgment being entered on it in the sum of \$8,737.06. *A levavi facias*

was then issued and the property advertised for sale. The claimant and holders of the mortgage then entered into an agreement that if there were no other bidders at the sale the property was to be sold to the claimant for \$50, he to pay the mortgage. This was done, and claimant took title to the property, executing a new mortgage for \$6000, and paying to the holders of the mortgage \$2,506.44 in cash, being the difference between the old and new mortgages, together with interest and costs, and a further sum of \$200.32 for taxes for the years 1904 and 1905, making a total of \$2,706.76. This sum he sought to recover from the decedent's estate, averring that the property was not worth more than \$6,000 when he purchased it. No action was ever brought against claimant on his bond by the holders of the mortgage.

OPINION.

Where a mortgage debt created by the vendor of real estate is made part of the consideration to be paid or assumed by the vendee, the assertion in the deed to him that the sale is "under and subject to" the debt,—while it will not, as formerly, since the Act of June 12, 1878, P. L. 205, give a right of action by the holder of the mortgage against the vendee, is regarded as implying an obligation by the latter to indemnify the vendor against any liability by reason of the debt (*Blood vs. Crew-Levick Co.*, 171 Pa. 328; 177 Pa. 606); and the liability thus arising is not simply *de terris*, but is coextensive with the original obligation: *Kirker vs. Wylie*, 207 Pa. 511; *Green vs. Stone*, 34 Atl. Repr. 1099,—referred to in *Blood vs. Crew-Levick Co.*, 177 Pa. 606.

In the present case the executors of one who had thus purchased real estate failed to pay interest on the mortgage under and subject to which it was bought by the decedent, and the property was sold by the sheriff under a judgment obtained by the holders of the mortgage, to whom the vendor—the original debtor—thus became liable for the payment of the debt; and under an arrangement with the plaintiffs in the judgment, who bought at the sheriff's sale, he took title to the property and paid to them the difference between the present value and the amount of the mortgage debt.

We think the estate of the decedent is liable for what was thus paid. It was not necessary that the claimant should delay payment

until judgment and execution; what a man may be compelled to do he may do voluntarily is an ancient maxim of the law (Co. Litt., 171a) and the arrangement by which he took title to the lands at their present value was manifestly to the advantage of the vendee's estate, which, had the purchaser at sheriff's sale been a stranger, at a less price, might have been obliged to pay a much larger sum. The arrangement, instead of being in restraint of bidders, was, in effect, an agreement to bid to the full amount of the mortgage if necessary.

That the claimant is not precluded from recovery by reason of having become the owner of the property as the result of the sheriff's sale, scarcely requires the citation of authority; but the point was expressly decided in *Wolfe's Appeal*, 14 Outerb. 126.

The decision in *Gimber's Estate*, 15 District Reps. 59, settles the question of liability for taxes left unpaid after the purchase from the mortgagor.

The exceptions are sustained and the adjudication modified accordingly. Counsel will prepare the necessary decree.

In the Orphans' Court of Allegheny County, No. 448, September Term, 1905.

**EXCEPTIONS TO ADJUDICATION SUSTAINING APPEAL
FROM REGISTER.**

Pare's Estate.

The proof of the factum of a later lost or destroyed will need not comply with the statutory requirements for probate in order to prevent the probate of a will dated prior thereto.

Messrs Reed, Smith, Shaw & Beal, for appellant.

Mr. W. A. Jordan, for proponent.

Opinion by Hawkins, P. J., February 23, 1906.

The controversy in this case turned on the question whether or not there is sufficient evidence of revocation of the will offered for probate. A will of Richard V. Pare, in which his wife was made sole devisee, has been offered for probate; a will of his widow, in which J. T. L. D. McCoy is the principal beneficiary, has also been offered; and McCoy is therefore a party interested in propanance. Both these wills are contested by Mr. and Mrs. Pare's granddaughter and sole heir-at-law—the

first on the ground of revocation by an alleged later will destroyed by McCoy, and the second on the ground of undue influence.

It will be seen that these contests emerge from the same atmosphere and are in touch with each other.

The facts are these: Some time prior to Mr. Pare's death, he had been adjudged a lunatic, but shortly before the making of the will offered for probate proceedings had been instituted for setting this aside, and testimony had been taken showing his competency, and thereupon a decree of annulment was entered five days after the date of the will.

Some discredit was also thrown upon testator's competency by the testimony of Thomas McCoy, father of proponent, who was a subscribing witness to this will. Upon depositions taken, he could only remember that Mr. Pare was unfit; but, when brought here by his son, his opinion had undergone a change, and his memory had revived so that he was able to testify before the register both to fitness and execution.

Objections to the competency of the testator and execution of this will were, however, abandoned at the argument of the exceptions, and there remains, therefore, the question of proof of the *factum* of a later will.

Mr. Pare died in 1885, leaving a widow, Hannah M., who survived him twenty years, and a daughter, who died leaving a husband, M. Ryan, and one child, Lillie, and an estate consisting of the house and lot in which he had resided on Taggart street, Allegheny. In his lifetime he had produced and asked his son-in-law, Ryan, to read his will, in which, he said, he had given his wife a life estate, with the remainder to his daughter. No will was offered for probate during Mrs. Pare's lifetime, although she made repeated and consistent declarations of such disposition up until in July, 1904, while living in McCoy's house, she made a will whose effect was to practically disinherit her granddaughter. So far as appears, there was no apparent reason for this change other than the influence of the new environment. The fact that Mrs. Pare, advanced in years, was taken into McCoy's house was itself strange, for there were already nine occupants in its four small rooms; and this was followed by his appointment as her business agent, his obtaining possession of Mr. Pare's wills, and the ills of litigation. The

circumstances in which the will of Mr. Pare, now offered for probate, are alleged to have come into his possession are these: When, as Mrs. Pare's agent, he went to the Taggart street house on an errand in September or October, 1904, he found in a chest in which Mr. Pare had kept his papers two wills—one of which, dated Dec. 1, 1882, was signed Richard V. Pare, and was without subscribing witnesses; and the other, now in question, was signed "Richard V. Pare," and was witnessed by Thomas McCoy, father of proponent; and John P. Dickenson; and in both of which Mrs. Pare was devised the Taggart street house without any gift over. He also says he had, in June preceding, found in a different part of this same chest an unsigned memorandum without date, in which it was stated that the will of Richard V. Pare would be found in the safe of Alderman Edgar, 43 West Diamond street. He took this memorandum to Alderman Edgar and made inquiry as to the fact. Edgar admits that the memorandum was in the handwriting of his officer, but says that after diligent search he was unable to find any will. At this point conflict of testimony begins. The principal witness of contestant, M. Z. Evans, who is entirely disinterested, testified very positively and intelligently that in the fall of 1904 the proponent showed him a will of Mr. Pare written on a half sheet of legal cap, dated after the will of August, 1883, to which there were subscribing witnesses, John S. Edgar and R. T. Rodney, and in which his property was given to Mrs. Pare, with the remainder to his daughter and her heirs. This testimony is corroborated by other disinterested witnesses as to the admissions of McCoy that he had such a will. Thus, he said to Mrs. Gorman that he had three wills, and that the third was one Mrs. Pare could never find; and to Rose Lambert, "Rose, I have found the will and Lillie is the legal heiress." Although the statements made by the contestant's witnesses on this subject are denied, the date of the alleged conversations and their relation to the disposition of Mr. Pare's estate are admitted. Following the memorandum found in Mr. Pare's chest into Alderman Edgar's hands, it appears that while he has no recollection of having drawn or witnessed such a will as is therein mentioned, he admits that he may have done so, and says that if he drew it he must have signed as a witness. The fact that he spent, as he says, two days looking for it implies at least an admission of a probability that he had

done so; and the memorandum found in Mr. Pare's chest in his officer's handwriting would raise a presumption, which has not been rebutted, that he in fact had at some time a will of Mr. Pare in his possession; but what will? It is improbable this will was either of those which were produced here, because these were in Mr. Pare's handwriting, in pencil, crude in form, and there is no apparent reason for their deposit elsewhere than in his chest; whereas, the probability is that when Alderman Edgar was consulted he drew a new will more formal in character than those which Pare had. R. T. Rodney, the other alleged witness, was more positive in his denial of attestation; but his denial was also on belief. He would not deny that he had witnessed other papers for Pare, but failed to specify what. In view of the fact that both these men were then, and have been since, very busy and had attested many other wills; it could not be expected that, after the lapse of twenty years, without anything to refresh their memory in the meantime, they would recollect so unimportant an event as this. Their failure of recollection is, therefore, immaterial.

As against this evidence stands the denial by proponent, McCoy, that he ever had in fact possession, or admitted that he had possession, of this alleged third will; but he comes discredited not only by his interest in the suppression of this will, but as making an unconscionable claim under an unnatural will. The weight of evidence is therefore greatly in favor of contestants, and this court finds:

1. That Mr. Pare produced and asked his son-in-law to read a will, in which he said he had given his wife a life estate and Mrs. Ryan the remainder.

2. That the widow, Mrs. Pare, had repeatedly and uniformly declared the existence of such a final disposition, and her refusal for that reason to sell.

3. The existence of a memorandum in circumstances which raise a probability of such a will remaining at Mr. Pare's death.

4. Proof by one witness of the production of a writing alleged by McCoy to be such will signed "Richard V. Pare" and subscribed by two witnesses; and, in corroboration of this witness,

5. Proof by several witnesses of admissions by McCoy that he had such will in his possession.

How this will came into McCoy's hands is not necessary to inquire.

It may be conceded at the outstart that the evidence adduced by this contestant would be insufficient were this an issue *devisavit* to establish probate of the will which she sets up by way of defence. But she is not seeking probate. The question, so far as she is concerned, is not of compliance with the terms of the statute of wills, but of answering proponent's claim of probate. The statute is not exclusive in its operation. It provides a method of procedure which parties interested may waive if they see fit, just as they may waive the statute of fraud or the grant of letters of administration. Thus it was held in *Houser vs. Lamont*, 55 Pa. 311, that chancery will decree specific performance of a contract within the statute of frauds where it is confessed in the answer. So a family agreement to dispense with administration was sustained in *Weaver vs. Roth*, 105 Pa. 408; and so it was held in *Phillips vs. Phillips*, 8 Watts, 195, that parties interested might bind themselves by a written or parol agreement to destroy a will, and such agreement might be shown by the act and declarations of the parties. So it was held in *Jones vs. Murphy*, 8 W. & S. 275, that proof of destruction by proponent of a later will would dispense with the need of proof of its contents; and so with as much reason would proof of admission of the *factum* of such will dispense with further proof. Why, then, exact the statutory form of proof useless things. The proponent is the only party interested in this will, and the proof shows his admission of its *factum*. His admission relieves the exigency of the defence. "It would be absurd," said the court in *Jones vs. Murphy*, 8 W. & S. 275, "to require strict proof of the contents of a will, so as to operate as a revocation, where it appears that it was destroyed by fraud;" and it would be equally absurd to require such proof where it appears that the existence of the will was admitted by the party who had destroyed it. When proponent asserted the existence of this will, he must be assumed to have spoken from knowledge; and having deprived contestant of the means of proving execution according to the statutory method, the principle of estoppel is applicable in all its force. It is axiomatic that every presumption must be taken against the spoiler, and that no man can take advantage of his own wrong: *Broom's Maxims*. The *factum* of the later will having been established by the admission of

proponent, revocation of the will which he has offered for probate follows as a necessary consequence. It is immaterial in this view whether this contestant shall be able to sustain probate of this later will; proponent has no interest in the matter, and contestant will take, whether there be testacy or intestacy. But even were she not heir-at-law, it would be enough that justice had been done and the spoiler foiled in his purpose: *Jones vs. Murphy*, 8 W. & S. 275.

It follows that the probate of the will offered must be refused.

NOTE.—On an issue *d. v. n.* execution of a lost will must be proved by two witnesses: *Mitchell vs. Low*, 213 Pa. 526.

*In the Court of Common Pleas of Lancaster County. Equity Docket,
No. 4, Page 261.*

MOTION TO DISSOLVE PRELIMINARY INJUNCTION.

McMullen vs. Williamson.

The owner of buildings on the opposite sides of a fourteen-foot wide public alley will not be enjoined, at the instance of an adjoining property owner, from erecting between his buildings a bridge six feet wide and twelve feet high more than fourteen feet above the surface of the alley, in the absence of proof that the bridge would interfere with travel on the alley or cause any injury to the plaintiff.

A private citizen cannot enjoin an interference with the public highways unless he shows that his legal rights have been invaded, causing some special damage to himself of a serious nature.

Messrs. B. F. Davis and Edwin M. Gilbert, for plaintiff.

Messrs. Coyle & Keller, for defendant.

Opinion by Hassler J., February 3, 1906.

From the bill, answer and testimony, we find the following facts: Mifflin alley, so far as it concerns this case, is a 14 feet wide alley, in Lancaster City, running from Duke to Christian streets, between East King and Vine streets. The plaintiff owns property on the northeast and southeast corners of Christian street and Mifflin alley. On the northeast corner is a stable, used in connection with the Exchange Hotel, also owned by plaintiff, which adjoins it on the north. On the southeast corner are a stone stable and shedding. The defendant owns property on the north side of Mifflin alley, 63 feet east of the property of the plaintiff, and also on the south side, adjoining the plaintiff's property and extending eastward to Duke street.

On defendant's property on the north side is erected a large building, which is a continuation of a store property fronting on East King street, owned and occupied by defendant. On the south side, beginning 60 feet east of the plaintiff's property, is a large brick warehouse and store building, fronting on Duke street, which he proposes to use in connection with his East King street store. Between this building on the south side of said alley and the plaintiff's stable at the southeast corner of Mifflin alley and Christian street is an open lot, with a frontage of 60 feet on said alley. The defendant is about to erect a bridge 14 feet some inches above the surface of the street to connect his buildings on the south sides of said Mifflin alley, which bridge is to be 6 feet wide and about 12 feet high.

The plaintiff has filed a bill in equity, seeking to enjoin the construction of this bridge, upon which we granted a preliminary injunction, which we are now asked to dissolve.

This bridge will not interfere with travel on Mifflin alley. It is 2 feet higher than the average county bridge or barn door, and will not interfere with the hauling underneath it of hay or straw, as is claimed in plaintiff's bill. It will not obstruct the light or air of plaintiff's property, nor will it interfere with firemen in case a fire should break out upon the property of the plaintiff. It has not been shown that the plaintiff will suffer any injury by reason of the erection of said bridge, nor has it been shown that it will in any way interfere with the public's use of said alley.

CONCLUSIONS OF LAW.

A private citizen cannot enjoin an interference with the public highways, unless such individual shows that his legal rights have been invaded, causing some special damage to himself: *Mechling vs. Bridge Co.*, 1 Grant, 416; *Sparhawk vs. Railway Co.*, 54 Pa. 401; *Livingston vs. Wolf*, 136 Pa. 519; *Saylor vs. Canal Co.*, 183 Pa. 167; *Cumberland Valley R. R. Co.'s Appeal*, 62 Pa. 218.

In *Livingston vs. Wolf*, 136 Pa. 523, the master, whose report was confirmed by the court and afterwards by the Supreme Court, says: "The rights of property owners along the public highway are nowhere defined with precision. * * * But when an individual asks an equitable remedy, when he seeks by injunction to restrain another from

erecting or maintaining that which is styled a nuisance, something more than the mere invasion of a legal right must be shown. He must, of course, first show that a legal, or, as it is sometimes called, a substantial right has been invaded, else, no matter how great the damage he may suffer from the act or omission of the defendant, he would not have any standing to complain. He must, then, go beyond this and show that the injury done him is not of a trifling character, but tangible, considerable and seriously interfering with the enjoyment of his property. Some of the cases even go further, and put it perhaps too strongly, by saying that the injury must be irreparable. At all events, the injury must be of a special, private and peculiar character. The mere fact that the object complained of amounts to a public nuisance does not render it improper for a private individual to seek relief by injunction, if his legal rights have been infringed, and if in addition to the damage suffered by the public generally, he shows a damage done him of a special and peculiar kind. * * * The rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom except such as is suffered by the public generally. He is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to relief therefor. The public nuisance becomes a private one to every person on whom it inflicts such peculiar damage." While the Supreme Court decided this case on other grounds. Judge Williams, in delivering the opinion of the court, says (page 535): "It follows that the projecting window is not an unlawful obstruction, but a lawful structure. If this conclusion could be regarded as doubtful, the decree ought, nevertheless, to be affirmed upon the finding of the master that the window caused no appreciable injury to the plaintiff."

In this case, it has not been shown that any right of the plaintiff has been or will be invaded or interfered with by the election of the proposed bridge; nor has it been shown that its erection will injure or damage the plaintiff in any particular. He is, therefore, not entitled to the relief sought, and we accordingly sustain the motion to dissolve the preliminary injunction.

Preliminary injunction dissolved.

In the Orphans' Court of Lackawanna County, No. —.

SUR PETITION TO REMOVE PROBATE.

In Re: The Estate of William Cornell, Deceased.

Where a will has been duly probated, and letters granted, the only mode in which they can be revoked by the Orphans' Court is on appeal from the register.

Messrs. Leach & Morrow, for petitioners.

Opinion by Sando, P. J., July 14, 1906.

We are asked by the petition of the widow, heirs-at-law, and legatees under the will of the testator, to set aside the probate of the will and to revoke the letters testamentary granted to Lewis Sherman. In the present proceedings, we are asked to go beyond our jurisdiction. The parties can agree by proper writing among themselves, to set aside and disregard the will, with the same force and effect as if no will had been executed or offered for probate. In this way they may annul the will, but the Court has no such authority.

William Cornell died on or about December 10, 1905, leaving his last will and testament, disposing of real estate and personal property, dated the 18th day of February, 1904, which was produced to and filed with, the Register of Wills for this county on January 20, 1906, and by him duly admitted to probate and letters testamentary issued to Lewis Sherman.

In the petition presented to this Court it is alleged that the testamentary paper is not the will of William Cornell; that its provisions and execution was caused by undue influence; that the provisions were changed and altered after its execution and that it is ambiguous, indefinite and uncertain. The petition further sets forth that the petitioners have made an agreement among themselves, duly signed and executed, for a more profitable, expedient and less expensive settlement.

The petition and this proceeding relate solely to the setting aside of the will duly probated and the revocation of the letters testamentary granted by the register to Lewis Sherman. The probate of the will has not been disproved in any "action at law:" Act of June 25, 1895, Sec. 1, P. L. 305. The register has made no attempt to revoke it. The only mode in which it could be "annulled or revoked" by this Court is on appeal from the "judicial act or decision" of the register thereon:

Act of March 15, 1832, Sec. 31, P. L. 144, and no appeal has been taken therefrom. A register is a judge; and admitting a will to probate is a judicial act; and it is settled in repeated decisions that the decree cannot under any pretence be re-examined in a collateral proceeding. The decree of the register is as conclusive in regard to real estate, as to personal, until annulled by competent authority, or disproved on a trial at law. By the 17th section of the Act of 1832, it is directed that "all original wills, after probate * * * shall be recorded and filed by the register" and "shall be adjudged and are hereby enacted to be matter of record." The will as probated is therefore "matter of record" and cannot be questioned in this proceeding: *Loy vs. Kennedy*, 1 W. & S. 396; *Shields' Appeal* 20 Pa. 291; *Barker vs. McFerran*, 26 Pa. 214.

The decree of probate of January 20, 1906, must stand until revoked or annulled in the manner provided by law. As the title to real estate is affected by this decree, it must be gotten rid of in the manner provided by the Act of June 25, 1895.

Where a will has been duly probated, and letters granted, the only mode in which they can be revoked by the Orphans' Court, is on appeal from the register.

Now July 14th, 1906, the petition is dismissed.

One who has only partially performed his contract to install, for a gross sum, a heating plant in a building, to consist of boilers, radiators, and piping, at the time the building is destroyed by fire without the fault of either party, is held, in *Dame vs. Wood* (N. H.) 70 L. R. A. 133, to be obliged to bear the loss, unless he shows that the material already in place could not have been removed for a reasonable sum, so that the owner of the building must be regarded as having accepted it as the work progressed.

A delivery and acceptance sufficient to satisfy the statute of frauds is held, in *Richardson vs. Smith* (Md.) 70 L. R. A. 321, not to be effected by a seller of tomatoes in cans, giving the buyer two cans as samples, which the latter takes away with him, where they are not included in the bulk of the sale. Symbolic delivery by sample to satisfy the statute of frauds is the subject of a note to this case.

In the Court of Common Pleas of Lackawanna County, No. 7, March Term, 1905.

IN EQUITY.

G. A. Dentzel vs. The Rocky Glen Park Company et al.

The general doctrine is that the extraordinary jurisdiction of chancery for the specific enforcement of contracts extends to almost every class of agreements which admit of no adequate remedy at law in damages for their breach. Notwithstanding, however, the lack of an adequate remedy at law, there are certain exceptions to the general rule above stated. One of them is that where the contract requires a succession of acts, to continue through a considerable period of time, which would require the protracted supervision of the court, and no public interests are involved, a decree for specific performance will generally be refused.

Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste and judgment, will not, as a general rule, be enforced by courts of equity because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty.

Courts of equity will refuse to exercise jurisdiction by way of specific performance in a class of special and exceptional contracts, when the terms and provisions are such that the court could not carry its decree into effect without exercising some personal supervision and oversight over the work to be done, and extending over a considerable period of time.

Messrs. O'Brien & Burr, for plaintiff.

Messrs. Vosburg & McGahren, for defendants.

Opinion by Kelly, A. L. J., August 24, 1906.

From the evidence in the case we find the facts as follows:

1. On the 22d day of July, 1904, the plaintiff entered into a written agreement with Arthur Frothingham and Annette Reynolds, trading as The Rocky Glen Park Company, for the erection of a merry-go-round or sarrousell in Rocky Glenna Park, an amusement park conducted by the park company, and to operate the same under certain terms and conditions for the period of ten years. The agreement is as follows:

"This agreement, made and executed this 22d day of July, A. D. 1904, by and between Annette Reyonlds and Arthur Frothingham, trading as the Rocky Glen Park Company, party of the first, and G. A. Dentzel of Philadelphia, Pa., party of the second part: Witnesseth, that the parties hereto, for and in consideration of the sum of one dollar, by each to the other in hand paid, the receipt whereof is hereby acknowledged, and the further considerations and covenants, hereinafter set forth, agree to and with each other as follows, to wit: The parties of the first part demise and let unto the party of the second part so

much ground at Rocky Glen Park, in the Borough of Moosic, Lackawanna County, Pa., as shall be necessary to be occupied by carrousell or merry-go-rounds as hereinafter provided; and do hereby give and grant to the party of the second part the exclusive right for ten years from the first day of May, 1904, to erect, maintain and operate corrousell or merry-go-rounds at Rocky Glen Park, at such points in said park as both parties agree upon.

"The party of the second part upon his part agrees to put in place, within twenty days, from this date, a fifty-foot carrousell equipped with forty-six different kinds of animals, three abreast, four double chariots and a large concert organ, to be operated by a ten horse power electric motor, and to build a suitable building to enclose the same before the first day of May, 1905, and in the meantime to provide a tent so that the business of conducting and operating said carrousell or merry-go-round can be carried on from twenty days from this date, during the remainder of the Rocky Glen season.

"The party of the second part further agrees to occupy the land demised and let to him as aforesaid, and to operate and maintain the carrousell or merry-go-rounds at such places as the parties hereto may agree upon, for the term of ten years from the first day of May, 1904. And the party of the second part shall, at his own proper cost and expense, purchase and erect said merry-go-rounds or carrousell and the buildings or tents required to enclose the same and shall also furnish his own light and power, equipment and machinery, and hire all the employes necessary for the operating and maintaining of said carrousell or merry-go-rounds.

"The party of the second part shall, in addition to the above covenants, pay to the party of the first part as rent for the ground demised and the privileges hereinbefore granted, twenty per cent. of the gross receipts received from and in connection with the operation of the said carrousell or merry-go-rounds. And it is mutually agreed between the parties hereto further, as follows:

"The rate of fare shall be five cents for a single ride or six rides for twenty-five cents and the tickets shall be the globe numeral tickets; separate reels shall be kept for the five cent straight tickets, and separate reels for the six rides for the twenty-five cents tickets, which

tickets shall be furnished by the party of the second part. The party of the second part shall hire as a ticket seller a person designated by the parties of the first part. The party of the second part shall have the right to discharge the party so employed and shall appoint other parties designated by the parties of the first part, and the party of the second part will at any time discharge the ticket seller so hired upon the request of the parties of the first part and appoint other persons designated by the parties of the first part as aforesaid.

"Settlements shall be made every Tuesday morning for the business of the previous week and shall be made according to the reel figures or numbers and the box receipts.

"It is further agreed that this lease shall be binding upon and accrue to the benefit of the heirs, executors and assigns of either and both of the parties hereto.

"In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

"The Rocky Glen Park Company.

"By Arthur Frothingham, (Seal)

"Annette Reynolds, (Seal)

"G. A. Dentzel, (Seal)

"In presence of C. P. O'Malley."

2. The parties to the contract agreed upon a place to locate the carrousell, and a contract was entered into with a builder to build a suitable building in which to install it. The building was completed and the carrousell installed in place and put in operation on the 24th of August, 1904. The plans for the building as furnished by the plaintiff were departed from by the builder at the instance of Arthur Frothingham, and the changes caused a delay so that the amusement plant was not installed within the time agreed upon. The delay was caused by Arthur Frothingham and was not the fault of the plaintiff. The reason the plaintiff did not furnish a tent for a temporary shelter was that Arthur Frothingham requested that he might be allowed to put up a wooden structure in the first instance.

3. The carrousell was kept in operation during the rest of the amusement season, viz., from August 24th until October 10, 1904. When it closed the season was practically over on account of cold

weather, and the gross receipts for the last few days were not sufficient to pay the expense of operation. No objection was made on the part of the park company to the closing of the plant at that time.

4. During the time of the operation of the Carrousell the plaintiff adhered to the terms of the agreement with reference to the hiring of ticket sellers, and in all other respects acted with entire good faith towards the park company. Settlements were not made every Tuesday morning for the business of the preceding week as required by the terms of the agreement, but no such settlements were ever refused by the plaintiff or his employees, nor was any demand made for settlements at any time. The plaintiff attempted to make a settlement with Arthur Frothingham after the machine had been in operation a few days, but Frothingham told him there was time enough; and after the season closed efforts were made by the plaintiff to pay to the park company the amount due under the terms of the contract. In December, 1904, a check was sent to Mr. Frothingham for the amount due, and in May, 1905, an agent of the plaintiff offered to pay to Mr. Frothingham the amount due, which offer was refused. An offer of payment and a tender was made of \$436.95, the amount due, together with interest on that sum, during the progress of the trial, in open court, to both Arthur Frothingham and Annette Reynolds, without any conditions, which they both refused to accept upon the advice of the counsel.

5. The plaintiff is ready and willing now, and has been at all times since entering into the contract, to perform his part of the agreement in every respect; while the defendants, Arthur Frothingham and Annette Reynolds, are not now and have not been since a short time after the carrousell was put into operation, willing to perform their part of the agreement.

6. When the equipment for the carrousell was shipped by the plaintiff from Philadelphia to Rocky Glen Park, there was one animal left out of the shipment so that there were but forty-five animals furnished instead of forty-six as called for in the contract. The omission was by mistake and not through any design on the part of the plaintiff, and was of no substantial injury to the machine. There is no evidence to show that any complaint was made about it or that the plaintiff was requested to supply the missing animal.

7. The plaintiff ordered an organ worth \$4,000, which he was ready to set up in connection with the carrousell at the opening of the season of 1905, but did not do so for the reason that he was not allowed to operate in 1905, notwithstanding he was ready to do so and made an effort to do so by sending an agent to the park before the season opened to prepare the plant for operation.

8. After the season of 1904 had closed one J. W. Richman, who was in the employ of the park company from September, 1904, until March, 1905, was employed by the plaintiff as a watchman at a salary of one dollar per week to look after his property, the carrousell in question. Richman was not employed in any other capacity by the plaintiff and was not his agent nor had he any charge of the plaintiff's business. On the 19th of January, 1905, a suit was begun before one of the aldermen of this city by Arthur Frothingham against the plaintiff, as a non-resident, by summons returnable on January 23, 1905. The summons which was issued was served upon Richman, in the presence of Arthur Frothingham, Annette Reynolds and William Frothingham, at Rocky Glen Park. Mr. Richman obtained an envelope from Arthur Frothingham into which he put the summons, sealed it up and addressed it to the plaintiff. He expressed his intention in the presence of the three defendants to mail it the next morning at Moosic, but Arthur Frothingham said he would mail it at Scranton that night, and Richman handed it to him, and he handed it to William Frothingham, who is his brother, telling him to drop it in the postoffice when he went home. The plaintiff never received the summons, and we find as a fact that it was never mailed. On January 23, 1905, the return day, the defendant was in default, and Arthur Frothingham obtained judgment against him in the sum of \$216 and costs. On the 14th of February, 1905, an execution issued upon this judgment, the property of the plaintiff in question here was levied upon and duly sold to William Frothingham for \$190. The property sold was worth upwards of \$15,000. The plaintiff knew nothing of the judgment or constable's sale until a few days before the filing of the bill. No claim or demand had ever been made by Arthur Frothingham upon the plaintiff for the \$216.

9. When the site for the erection of the carrousell was selected

by the parties to the agreement the plaintiff believed that the ground was under the control of the park company, but as a matter of fact part of the land upon which the building was erected was not under control of the park company, which the members of the company knew at the time, but was owned by the Hudson Coal Company. Arthur Frothingham and Annette Reynolds, who composed the park company, had an oral agreement with the land agent of the owner to purchase a twenty-acre piece of land in which this part covered by the building was included, and a deed to William Frothingham was made on December 6, 1904, for this piece of land, and delivered to William Frothingham on December 13, 1904. The negotiations for the purchase were carried on by Arthur Frothingham and Annette Reynolds. Arthur Frothingham directed the deed to be made to William Frothingham, and Annette Reynolds furnished the money to pay for the property to William Frothingham, viz. \$1,000, and he paid it to the agent of the Hudson Coal Company and received the deed in the presence of Arthur Frothingham and Annette Reynolds.

10. The defendants are guilty of the charge made in the seventh paragraph of the plaintiff's bill, viz.. of unlawfully conspiring together to deprive the plaintiff of the use of his property and the benefit of the agreement set out in our first finding.

11. The building which was erected on the grounds by the plaintiff at a cost of \$4,500 and upwards cannot be removed, and by reason of the refusal of the park company to allow the plaintiff to operate under the contract the cost of the building is a total loss to the plaintiff. The other part of the carrousell can be removed by the plaintiff. The plaintiff will suffer damages in the future on account of the defendants, Arthur Frothingham and Annette Reynolds, refusing to perform their part of the contract, which damage cannot be now ascertained with any degree of certainty.

From the facts we arrive at the following conclusions of law:

1. In view of the nature and character of the contract between the parties specific performance should not be decreed and the plaintiff must resort to an action at law to recover his damages.

2. That a permanent injunction should issue restraining the de-

fendants from interfering with the plaintiff's property or the right of the plaintiff to remove the same from the Rocky Glen Park.

3. That our adjudication and decree in this case shall be without prejudice to the right of the plaintiff to bring an action at law against the defendants to recover loss of profits on account of the refusal of the defendants, Arthur Frothingham and Annette Reynolds, to carry out their part of the contract, and any damages which he may be entitled to recover.

4. That no injunction should issue to restrain the defendants from operating a carrousell other than the one erected by the plaintiff, at Rocky Glen Park.

5. That the defendants should pay the costs of this suit.

We are requested by the plaintiff and defendants to make certain findings of fact and law. The requests and our disposition of them will follow the discussion.

DISCUSSION.

During the course of the trial the defendants, by their counsel, expressly disclaimed all claim of title to the property in question in this case which might have been acquired by virtue of the constable's sale to William Frothingham, which we refer to in our eighth finding of fact. We need not, therefore, discuss the propriety of enjoining them from doing so. That they should be so enjoined may not be necessary, but inasmuch as the evidence in the case clearly sustains the plaintiff's contention that the sale was brought about by the defendants collusively and for the purpose of depriving the plaintiff of the use of his property and the benefit of his contract, we think it proper to decree that the defendants should be enjoined from interfering in any way with the plaintiff's ownership, or asserting or exercising any act of ownership over the property, notwithstanding their disclaimer of any intention to do so. Their disclaimer is not consistent with their previous conduct and cannot have the effect of depriving the plaintiff of the benefit of a decree.

We have found that the merits of the case are with the plaintiff. The defendants, Arthur Frothingham and Annette Reynolds, who constitute the Rocky Glen Park company, have shown by their conduct

that they repudiate the contract they entered into with the plaintiff. They have refused to carry out their part of it, if not by express words by conduct which just as plainly discloses their intention to do so. They have attempt to divest the plaintiff's title to the carrousell which he set up under the contract at an expense of upwards of \$15,000, by bringing about a constable's sale of it without the plaintiff's knowledge; they have refused to accept from the plaintiff the sum of money which has been tendered to them from time to time as their share of the receipts for the season of 1904, apparently in fear that an acceptance would constitute an acknowledgement of the existence of the contract; they have, through their servants, prevented the plaintiff from putting the carrousell in operation in the beginning of the season of 1905; they have set up another similar amusement adjoining that of the plaintiff, and have operated it since the 4th of July, 1905, notwithstanding their agreement which granted to the plaintiff the "exclusive right for ten years from the first day of May, 1904, to erect, maintain and operate carrousell or merry-go-rounds at Rocky Glen Park, at such points in said park as both parties agree upon"; they have offered, through their counsel, to allow the plaintiff to take the property in question, but they have never offered to allow him to operate at their park; and all of the evidence shows their intention to break the contract and to refuse to go under it. They have attempted to justify their conduct by showing that the fault first lies with the plaintiff; that he failed to perform his part of the agreement in many particulars; but in this they have not been successful. Under the fair weight of the evidence we feel that we are bound to find the facts against them.

The plaintiff in his bill prays for a decree for specific performance of the contract, and as we have found the facts in his favor the question is whether a contract of this nature should be enforced in equity by such a decree. The general doctrine is that the extraordinary jurisdiction of chancery for the specific enforcement of contracts extends to almost every class of agreements which admit of no adequate remedy at law in damages for their breach: 26 Am. & Eng. Ency, of Law, 2d Ed., 87. That the plaintiff in this case has no adequate remedy at law is apparent. The amount of his loss by reason of his being deprived of the benefit of his agreement is largely conjectural. It depends upon

so many circumstances which cannot be foreseen that it is impossible to ascertain what the plaintiff's loss would amount to. Any attempt to give average attendance or average receipts based upon experience in other places, or even in Rocky Glen, is mere speculation. While, perhaps, the plaintiff might recover in an action at law the expense incurred in setting up his carrousell, which constitutes a complete loss to him by reason of his being prevented from operating it and being compelled to remove that part of it which can be removed, yet such a remedy would not be adequate, because he would still be at a loss of his profits.

But notwithstanding the lack of an adequate remedy at law, there are certain exceptions to the general rule above stated. One of them is that where the contract requires a succession of acts, to continue through a considerable period of time, which would require the protracted supervision of the court, and no public interests are involved, a decree for specific performance will generally be refused: *Ibid*, 95. "Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty:" Vann, J., in *Standard Fashion Co. vs. Siegel-Cooper Co.*, 157 N. Y., 66. The principle is also clearly stated in *Wharton vs. Stoutenburgh*, 35 N. J. Equity, 266, that courts of equity will refuse to exercise jurisdiction by way of specific performance in a class of special and exceptional contracts, when the terms and provisions are such that the court could not carry its decree into effect without exercising some personal supervision and oversight over the work to be done, and extending over a considerable period of time.

The case before us is within the exception to the general rule, and is within the principle which is well established by the authorities, some of which are above referred to. The contract in question here is one that could only be successfully carried out by harmonious action. The parties to it are entirely out of harmony with each other, and there would arise all kinds of disputes between them from time to time which

would require the aid of a chancellor to adjust. We are, therefore, compelled to refuse to decree specific performance.

There is another question in the case which is not raised in the pleadings, but which the evidence and our findings of fact suggest, viz., whether the defendants should be restrained from operating, or allowing others to operate, any other carrousell at Rocky Glen Park during the period covered by the contract, in violation of the grant to the plaintiff of the exclusive right to so operate. While the prayer for general relief is sufficient to include this, yet the fact is entirely outside of the averments. The setting up of the other carrousell was subsequent to the filing of the bill, and as no supplemental bill has been filed we do not consider the question properly before us. We, therefore, refuse to award such an injunction, without expressing any opinion.

Let a decree nisi be entered in accordance with our findings; notice to be given to the parties *sec. reg.* that exceptions may be filed.

The plaintiff's requests for findings of fact and our disposition of them are as follows:

1. That on the 22d day of July, 1904, the plaintiff and Arthur Frothingham and Annette Reynolds, two of the defendants, trading as the Rocky Glen Park Company, entered into an agreement giving the plaintiff the exclusive right for ten years from May 1, 1904, "to erect, maintain and operate carrousell or merry-go-rounds at Rocky Glen, at such points as both parties might agree upon." And, that pursuant to said agreement a place was selected for said carrousell or merry-go-round and the plaintiff did erect the same upon the place designated by the defendants, Arthur Frothingham and Annette Reynolds, and same was in operation for the season of 1904, from and after its completion on the 24th day of August, 1904, until October 9, 1904; that the failure to complete the same before August 24, 1904, was due entirely and exclusively to the acts and interferences of said Arthur Frothingham and Annette Reynolds, and not to any delays or neglect of the plaintiff.

Answer. This request is granted.

2. That the plaintiff was and is ready and willing at all times to account to said Arthur Frothingham and Annette Reynolds for their share in the receipts of said carrousell or merry-go-round, but that said Arthur Frothingham and Annette Reynolds at all times have declined

to receive the moneys due them under said agreement dated July 22, 1904, and have waived their right for the year 1904 to a strict compliance with the terms of the said agreement which provides for the time and manner of such payment; that tender of amount due them for 1904 was repeatedly made and finally in open court on the 16th day of September, 1905.

Answer. Granted.

3. That on or about the 13th day of December, 1904, the defendants, Arthur Frothingham and Annette Reynolds, arranged to take a deed in the name of William Frothingham from the Hudson Coal Company for land which included part of the land occupied by said carrousell; but no part of the consideration was paid by William Frothingham; that the same was loaned by E. S. Williams at the solicitation of Arthur Frothingham and Annette Reynolds, and a mortgage for \$3,000, including the amount of such loan, was given by William Frothingham. That the original option for purchase was obtained by Arthur Frothingham and Annette Reynolds from W. J. Lawrence, real estate agent of the Hudson Coal Company, and was never reduced to writing or transferred except by the direction of Arthur Frothingham and Annette Reynolds to said W. J. Lawrence to make the deed to William Frothingham; that William Frothingham took no part in negotiating for said land or any part thereof, but was simply agent or representative of said Arthur Frothingham and Annette Reynolds.

Answer. The facts stated in this request are substantially, but not entirely, correct. We, therefore, refuse it.

4. That the carrousell was erected partly upon land of Rocky Glen Water Company and partly upon land purchased by William Frothingham from Hudson Coal Company. That the defendants, Arthur Frothingham and Annette Reynolds, represented to the plaintiff and induced him to believe at and before the time of the erection of the carrousell, that they owned and controlled the land within Rocky Glen Park.

Answer. Granted.

5. That on the 23d day of January, 1905, said Arthur Frothingham obtained judgment before Alderman W. S. Millar, of Scranton, against the plaintiff for \$216; that a constable's sale thereon was had

and the carrousell of plaintiff and other property were purchased by William Frothingham, at such sale for \$190, although the same was worth \$15,000 or more. That no summons was served upon plaintiff or any one authorized to represent him; that there was no such indebtedness owing by plaintiff to said Arthur Frothingham as the record of the alderman set forth; and that the judgment was reversed in certiorari proceedings by this court on the 24th day of June, 1905. And said judgment and sale of the plaintiff's property therein were all a part of a conspiracy entered into by the defendants to secure possession and control of the plaintiff's property.

Answer. Refused. There is no evidence in this case of the certiorari proceedings.

6. That shortly after said constable's sale William Frothingham admitted that the purpose of said judgment and sale, and his conduct prior thereto, was to defraud the plaintiff.

Answer. Refused. This is not a proper request for a finding of fact. It is a request to state evidence.

7. That the defendants, Arthur Frothingham and Annette Reynolds, have repeatedly and continuously interfered with the plaintiff in his attempts to operate said carrousell under said agreement, by refusing to let his agent and representative begin the operation thereof for the season of 1905, also by threats, and by refusing said agent admission to said Rocky Glen Park; that said Arthur Frothingham had expressed a determination during the season of 1905, to prevent the operation thereof at any time under said agreement.

Answer. Granted.

8. That the plaintiff suffered a net loss of \$32.55 per day during the season of 1905, that is, from May 31st, to October 31, 1905, because he was not permitted to operate his said carrousell under said agreement.

Answer. Refused.

The defendants' requests for findings of fact and our disposition of them are as follows:

1. That according to the agreement between the parties which is printed in Exhibit A of the plaintiff's bill, the plaintiff stipulated and agreed to put in place and operate a fifty-foot carrousell so that the

business for which it was designed could be carried on within twenty days from the date of said agreement, to wit., 22d day of July, 1904, during the remainder of the Rocky Glen season.

Answer. Granted.

2. That according to the plaintiff's own admission he did not have the said carrousell set up and put in place so that it could be operated and the business carried on until the 26th or 27th of August, 1904.

Answer. Refused. It was ready for operation on August 24, 1904, and the delay was the fault of the defendant, Arthur Frothingham.

3. It is not controverted or denied that the Rocky Glen season in 1904 continued open and business was carried on in the park until the last of October in said year. The plaintiff admits in his bill that he closed his plant and ceased to operate the carrousell or merry-go-round on the 9th day of October, A. D. 1904.

Answer. Refused.

4. The plaintiff has offered no evidence to show that the defendants or either of them waived the time stipulation in said contract, fixing the date when said carrousell should be put in operation and ready to do business and the date when it should be closed, to wit, the end of the Rocky Glen season.

Answer. Refused.

4½. Although it was in the power and became the duty of the said plaintiff to keep a strict and accurate account of the business done with said carrousell or merry-go-round, itemized in such a way that the Rocky Glen Park Company could by inspection ascertain and determine the amount of said business each day and week during the amusement season and know whether they were fairly and honestly dealt with, yet the plaintiff did not keep the account of the business in such manner, but simply lumped it into a round sum at the end of the season, by claiming that he sold so many tickets during the season at a specified price.

Answer. Refused.

4¾. The plaintiff, although accorded the right and privilege to take possession and remove his property from the premises at Rocky Glen, averred his unwillingness to do so. And although he admitted

that he had not paid any rental as agreed upon or compensation for the use of the land he asserted in the same connection he would not agree with the present holder of the title to pay him for the use of the land occupied by said carrousell or merry-go-round.

Answer. Granted.

5. Although the said contract provided and required that the said plaintiff should pay to the Rocky Glen Park Company as rent for the ground demised twenty per cent. of the gross receipts derived from and in connection with the operation of his carrousell or merry-go-round, yet the plaintiff admits that he did not pay the said rental to them, the said defendants, nor did he tender payment of it to them prior to the inception of this suit, and he still owes the said rental to them.

Answer. Refused.

6. The said contract required that the plaintiff should make settlements with the Rocky Glen Park Company (lessor) every Tuesday morning for the business of the previous week, according to the reel figures or numbers and the box receipts, and the evidence show that no settlement was made with said company or the members composing it during the whole time the business was carried on there nor since.

Answer. Granted.

7. While the plaintiff claims that he was not on the ground after the first ten days when the carrousell was put in operation he asserts that he instructed those whom he placed in charge of his business to make settlements every week and payments of rentals. And the plaintiff has not called said employes to show that he gave them such instructions or that they made any effort to carry them out.

Answer. Refused.

9. Although the plaintiff claims to have in his possession at the time of the trial a reel from which the tickets sold at the park were taken and the numbers on the tickets showing precisely the amount of business done by the operation of his carrousell he did not offer the same in evidence but simply put in evidence a statement purporting to be a copy of the one which he alleges was mailed to Mr. Frothingham and this he averred was made from the data on the reel.

Answer. Granted.

10. There is no averment in the plaintiff's bill that he, the said

plaintiff, kept and performed his part of the said agreement with the defendants or either of them, except that he erected and operated a carrousell or merry-go-round at Rocky Glen Park during a part of the season of 1904. Nor is there any averment in the said bill that the said defendants derived any benefit, advantage or profit from the said contract which would entitle him to enforce the same against them.

Answer. Refused. The averments of the bill speak for themselves.

11. Notwithstanding the absence of such material averments in the bill, the plaintiff has offered no evidence to show that the defendants derived any benefit, advantage or profit arising out of the making of said contract with the defendants.

Answer. Refused.

12. Although the plaintiff averred in the paragraph of his bill that it was his desire to place in position in connection with the carrousell an organ which he had purchased in Paris, France, at a cost of \$4,000, and repaint the carrousell and structure work and renew the electric installation necessary for the energy of the motor and lighting, as well as repair and restore the canvas enclosing the sides of the carrousell, yet the evidence shows that the plaintiff omitted and neglected to do or perform any of the things herein stated, although the defendants were enjoined and restrained by your honorable court from "removing, conveying, encumbering or in any way doing injury to any of the property described in the plaintiff's bill."

Answer. Refused.

13. The evidence shows that the plaintiff made no effort to operate or carry on business with his carrousell at Rocky Glen Park during the present year, and under the said contract he obligated himself to carry on said business for the term of ten years from the 1st day of May, 1904.

Answer. Refused.

14. The evidence show that by reason of the plaintiff's failure to keep and perform his contract with the Rocky Glen Park Company the defendants composing said company were obliged to purchase, erect and operate a new carrousell or merry-go-round at Rocky Glen

Park, on or about the 4th day of July, 1905, for the purpose of carrying on their business.

Answer. Refused.

15. The evidence shows that the judgment referred to in the sixth paragraph of the plaintiff's bill was voluntarily satisfied by the plaintiff, Arthur Frothingham, to wit, on the — day of ———, A. D., 1905, before the adjudication of the proceedings by certiorari involving the validity of said judgment.

Answer. Granted.

16. William Dentzel, manager of the plaintiff's business, admits on page 40 of the testimony, that the reason settlements were not made of the business with the Rocky Glen Park Company more promptly or in accordance with the terms of the contract, was because his father, the plaintiff, was in Europe, and he himself had much business to attend to in the west.

Answer. Refused. This is not a request for a finding of fact.

The plaintiff's requests for conclusions of law and our answers to them are as follows:

1. That the defendants conspired together to defraud the plaintiff out of his property and out of the profits thereof.

Answer. Refused. This is not a request for a conclusion of law, but of fact.

2. That the defendants entered into a conspiracy to devise a fictitious and unfounded claim, to bring suit thereon, and to sell the property of the plaintiff, fraudulently and without warrant in law.

Answer. Refused as immaterial. Whether the claim was fictitious or not does not matter. We have found that the purpose of the suit was unlawful.

3. That the plaintiff is entitled to the sum of \$4,882.50 as damages for the breach of contract on part of defendants.

Answer. Refused.

4. That the plaintiff is entitled to damages by reason of the acts and interferences of the defendants after the bringing of this action and pending the same.

Answer. Refused.

5. That an order should be made by the court, permanently re-

straining by injunction the defendants from interfering with or obstructing the plaintiff, his officers, agents, servants and employes in the operation of his carrousell at Rocky Glen Park and from exercising his right of ownership thereover, and from exercising his rights under the agreement between him and defendants dated July 22, 1904, as aforesaid, for the full contract term of ten years.

Answer. Refused.

The defendants' requests for conclusions of law and our answers to them are as follows:

1. That the plaintiff having violated his contract with the defendants, who are parties thereto, in the matters and things above particularly recited and set forth, he is not entitled to a specific performance of the same against them, either under the pleadings or the evidence in the case.

Answer. Refused as drawn.

2. The mere erection of the carrousell or merry-go-round and operation of the same until the 10th day of October, 1904, would not of itself, entitle him to the enforcement of said contract against the defendants without the payment of rent and the faithful performance on his part of the other acts expressly mentioned and set forth in said contract to be by him performed and carried out.

Answer. Affirmed.

3. The well known maxim of equity requires that he who seeks equity should do equity, and the evidence in this case clearly shows that the plaintiff has violated this maxim.

Answer. Refused.

4. There is no evidence in the case to warrant or justify a finding that the defendants conspired together to cheat and defraud the plaintiff out of his property or to deprive him of the profits arising out of his contract with them.

Answer. Refused.

5. There is no averment or allegation in the plaintiff's bill of any claim for damages against the defendants on account of a breach of contract on their part, nor is there any averment of a claim or demand that the defendants should account to the plaintiff for the profits and income derived by them from operating the carrousell erected by them

in July, 1905, hence the plaintiff is not entitled to a decree against them for an accounting, or for a loss of profits and income arising out of a breach of contract on their part. "The court will not decree more than the plaintiff claims in his bill, whatever he may prove." Cumberland R. R. App., 62 Pa., 218.

Answer. Refused. This is not a proper request for a conclusion of law.

5½. The injunction awarded by your honorable court against the defendants should be dissolved and the bill dismissed at the costs of the plaintiff.

Answer. Refused.

Acquittal of the larceny of a piano is held, in Nordlinger vs. United States (App. D. C.) 70 L. R. A. 227, to bar a subsequent trial same circumstances, except that the subject of the theft is stated to be an auto-electric piano, or autoelectra, instead of a piano, as stated in the first indictment.

On the question of damages for condemning a railroad right of way across a strip of oil-bearing land, it is held, in Southern P. R. Co. vs. San Francisco Sav. Union (Cal.) 70 L. R. A. 221, that they should not represent the fee value, but only the value of the easement, since the conditions are such that the oil can be taken from under the right of way by sinking wells on the portion of the strip which remains in possession of the original owner, so that there is a substantial difference between the value of the easement and that of the fee.

The right of a father to recover from a telegram to apprise the company that such witnessing the suffering of his child because of failure of the company promptly to deliver a telegram summoning a doctor to relieve him, is denied in Western U. Teleg. Co. vs. Reid (Ky.) 70 L. R. A. 289,—at least where there is nothing on the face of the telegram to apprise the company that such a claim will be the result of its negligence.

A deed of trust upon real estate is held, in Benton Land Co. vs. Zeitler (Mo.) 70 L. R. A. 94, not to be such an outstanding legal title as will, even after condition broken, but before entry or foreclosure, defeat a recovery in an action of ejectment for the property, based on titles held subject thereto.

In the Court of Common Pleas of Lackawanna County, No. 5, May Term, 1905.

IN EQUITY.

ADJUDICATION.

John Vaughan, Admr., vs. Daniel W. Vaughan, et al.

The fact that no valuable consideration passed and that the assignment was from a father to a son, raises no presumption against its fairness and honesty, and does not place the burden on the assignee to affirmatively show its fairness, and that it was a voluntary act without undue influence.

Every fiduciary relation implies a condition of superiority held by one person over the other.

Where a person obtains an assignment from a person physically infirm and mentally weak, and the assignee is a person who stands in a close and confidential relation to the assignor, the assignee is bound to show that the assignment as a gift was righteous and conscientious, and also that the assignor acted intelligently, deliberately and freely, with full information of the amount of his property, the effect upon the estate, the nature of the assignment, and that no advantage was taken of the confidential relation.

Relation of father and son, the benefit passing from father to son, does not shift the burden to the son to prove the fairness and honesty of the transaction.

Where plaintiff fails to establish the material allegations of his bill by two witnesses, or one witness and such corroborating circumstances as would amount to another, defendant's motion for a decree of dismissal at close of plaintiff's case should have been allowed.

A plea in abatement is a dilatory plea and must be interposed before an issue is joined on the merits; and pleading in bar is a waiver of the right to plead in abatement.

A son claiming against his father's estate is incompetent to testify to an agreement between him and his father relating to the fund in controversy.

The exception is: Unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.

Messrs. P. E. Kilcullen and Charles Olver, for plaintiff.

Messrs. T. A. & M. J. Donahoe, for defendants.

Opinion by Kelly, A. L. J., September, 1906.

From the evidence in the case we find the facts as follows:

1. John Vaughan, Sr., died intestate, on the 28th of January, 1894, at the age of eighty years, survived by his three sons, John, Daniel W., and Michael, and by three children of his deceased son, James C. Vaughan. Shortly after his death letters of administration were granted to John Vaughan, one of his sons, who is the plaintiff in this case.

2. The real estate which he owned consisted of a farm in the state of Nebraska, worth \$5,000, a house and lot on Willow street, in the city of Scranton, where he made his home, worth \$2,500, and two vacant lots on Palm street, Scranton, worth \$500. His personal property consisted of some household furniture and wearing apparel, of little or no value, about sixty dollars in cash, and a promissory note against the South Scranton Building and Loan Association, dated April 6, 1903, payable in three months after date, for \$3,350, with interest at the rate of five per cent. He left no debts, as far as the evidence shows.

3. On the 14th of January, 1904, he assigned the note to his son, Daniel W. Vaughan. The assignment is in the handwriting of Daniel W. Vaughan, on the back of the note, and was signed by John Vaughan, Sr., by his own undisputed signature, and delivered to Daniel W. Vaughan. At that time the decedent was in good health, and, as far as the evidence shows, in sound physical condition. He was somewhat deaf, but not to any great extent. He was not mentally weak, but was of sound mind, and capable of transacting business intelligently and understanding the nature and character of his acts.

4. There is no evidence in the case showing that he was influenced by his son to make the assignment in question, or that it was not his own voluntary act. There were no confidential relations between them other than the usual relations between father and son who are on good terms, and the decedent was on good terms with all of his children and grandchildren. He was more intimate with Daniel than with the others, and members of Daniel's household assisted him somewhat in his house-keeping, and furnished him part of his food.

There are certain requests for findings of fact on the part of the plaintiff and defendants. Those of the plaintiff and our disposition of them are as follows:

1. John Vaughan, a resident of the city of Scranton, died intestate January 28, 1904. He was eighty-two years of age and upwards at the time of his death. He was survived by three sons, John Vaughan, Jr., Daniel W. Vaughan and Michael Vaughan, and by three grandchildren who were children of a deceased son, J. C. Vaughan.

Answer. We so find, except that we find that the age of the deceased was eighty years.

2. The plaintiff was granted letters of administration on the estate of the decedent, John Vaughan, Sr., by the Register of Wills of Lackawanna County, qualified and entered upon and is performing the duties of administrator.

Answer. Granted.

3. The personal property of the decedent at the time of his death consisted of a few articles of household furniture valued at fifteen dollars and a promissory note in the sum of three thousand three hundred and fifty dollars, dated the 6th of April, 1903, payable in three months. This note was given by the South Scranton Building and Loan Association to said John Vaughan for a loan of that amount. The note is as follows:

"Whereas, at a regular meeting of the Board of Directors of the South Scranton Building and Loan Association, of Scranton, Pa., held on Monday evening, April 6, 1903, a motion was regularly made, seconded and carried, that the president be authorized and empowered to borrow a sufficient sum of money to make up an amount required to complete loans made at the meeting of April 6, 1903, and to execute a note for the same, and authorizing the secretary to attest said note under the seal of said association.

"Know ye, therefore, that I, S. S. Spruks, President of said association, under the power and by the authority of the motion heretofore set forth, do hereby promise to pay three-months after date to John Vaughan, Sr., or order, the sum of thirty-three hundred and fifty (\$3,350.00) dollars, for value received, with interest at the rate of five per cent. (5%) per annum. Interest to begin April 3, 1903.

"Done this 6th day of April, A. D. 1903, at the city of Scranton, at which time the seal of the said association was affixed hereto, and the attestation of the Secretary of said association.

"South Scranton Building & Loan Association.

"(Seal)

By S. S. Spruks, President.

"Attest: M. J. Ketrick, Secretary."

Received interest October 4, 1903, \$83.75.

Answer. Granted, except that we find that he also left about sixty dollars in cash.

4. The real estate owned by the decedent consisted of a farm in

the state of Nebraska, valued at five thousand dollars; a house and lot in Scranton, valued at twenty-five hundred dollars, and two lots valued at five hundred dollars.

Answer. Granted.

5. The administrator soon after taking out letters, demanded payment of the note of the South Scranton Building & Loan Association. The officers of the association refused to pay, and state that Daniel W. Vaughan had presented the note for payment and that there was an assignment to him, D. W. Vaughan, alleged to have been executed by the decedent, John Vaughan, Sr. There is such an assignment on the note, in the following language:

"Scranton, Pa., Jan. 14, 1904.

"For value received, I hereby assign the within note, with interest, to my son, Daniel W. Vaughan.

(Signed) "John Vaughan."

The assignment is in the handwriting of Daniel W. Vaughan, the son.

Answer. Granted.

6. John Vaughan, in January, 1904, was an old man beyond eighty-two years of age. During the last six months or year of his life he was feeble and childish, weakened by age and disease. He was physically infirm and mentally weak.

Answer. Refused.

7. For some time prior to his death, probably several years, John Vaughan lived alone in his residence on Willow street.

Answer. Subsequent to his wife's death, in June, 1903, he lived there alone.

8. On the 24th of January, 1904, he was taken seriously ill. On the 25th he was removed to the house of his son, Daniel W. Vaughan, not far from and in the neighborhood of his own residence. He was weak and seriously ill on the 25th and 26th, and a part or all of those days he was in a semi-comatose condition. He gradually became worse, and died on the 28th of January, of Bright's disease.

Answer. Granted.

9. Daniel W. Vaughan, one of the defendants, son of the decedent, took the title papers to decedent's real estate, and subsequently

gave them to the plaintiff in this case. These papers were obtained from the house of his father by D. W. Vaughan, and he also took therefrom something over sixty dollars in money. There were also removed from the house of the decedent about three tons of coal to the house of D. W. Vaughan. The money has not been paid to the administrator, nor has D. W. Vaughan paid for the coal or accounted for it.

Answer. Refused. Part of the facts are correctly stated, but it is not a fact that Daniel W. Vaughan took the money from decedent. Decedent handed it to him.

10. The decedent, prior to his death, was friendly with all the sons and their children.

Answer. Granted.

11. On the 27th day of January, 1904, M. J. Kettrick, secretary of the Building & Loan Association, whose note is the subject-matter of this suit, was called to the house of D. W. Vaughan and to the room of John Vaughan. The decedent said to him that he wished him to give some money to D. W. Vaughan. Kettrick said: "The interest—I will pay him the interest then." And D. W. Vaughan said, holding a paper to his father: "You mean the whole thing, don't you, father," and he seemed to think a little and finally said it was the money he wanted to pay to D. W. Vaughan. When Kettrick and D. W. Vaughan came into the room D. W. Vaughan said: "Father, Mr. Kettrick is here now and you can talk to him." The decedent said that he wanted him (Kettrick) to do what was right with the money. Old Mr. Vaughan commenced to tell Kettrick how long he had known him, and that he knew he would do right in regard to the money. He seemed to have an idea that Kettrick could do as he pleased with it, and Kettrick told him that it would be all right so far as he was concerned. Then Kettrick spoke about the interest, and D. W. Vaughan said: "You don't mean the interest, father, you mean the whole thing; you mean this whole thing." And he showed him the note, held the note in his hand and said, "You mean this, father, the whole thing." Kettrick adds that he may have said, and it may be true, that the decedent merely nodded his head. At the time the patient was so ill that it was painful to have conversation with him.

Answer. Refused.

12. The amount of the note is nearly one-third of the total value of the decedent's estate. If the defendant, Daniel W. Vaughan, takes the note, and under the intestate law one-fourth of the remainder of the property of the decedent, he will get nearly one-half of the estate.

Answer. Granted.

13. The decedent was in the habit of visiting the house of D. W. Vaughan every day and reading the papers, or coming for them and taking them to his home. The defendant, D. W. Vaughan, attended to many of the business matters of the decedent, and the relations between him and his father were close, and he treated the home of his son Dan as his own.

Answer. Refused as a whole. He did not treat Daniel's home as his own, but was on very familiar terms with him and frequented his home a great deal.

14. On the 27th or 28th, Vaughan, Sr., asked to have a lawyer sent for, that he might make a will. Finally after repeated requests C. C. Donovan, Esq., was called, but when he came to the house the decedent was so exhausted that the attorney was not permitted to visit or see him.

Answer. Granted.

15. (Note.) We believe the testimony of D. W. Vaughan is incompetent and should be rejected, but if received we ask the Court to find the following additional facts:

admits. We submit to thew! etaohrdltuatodlnlotunounoanaounaoun

The hand of John Vaughan, Sr., was steadied by Daniel W. Vaughan in order to get the signature in the proper place. This the defendant admits. We submit to the Court that from the appearance of the signature, if it were necessary for a person to steady the hand in order for him to start the signature, it was also necessary for him to steady the hand during the time the signature was made in order to keep it as level and smooth as it appears under the assignment.

Answer. As we have rejected the testimony of D. W. Vaughan as to matters occurring in his father's lifetime, the additional request is refused.

The requests of the defendants for findings of fact and our disposition of them are as follows:

1. That the plaintiff has failed to sustain the allegation of his bill as to the mental and physical weakness of incapacity of John Vaughan, Sr., deceased.

Answer. Granted.

2. That the plaintiff has failed to sustain the allegation of his bill as to any undue influence, duress or fraud, having been practiced by the defendant, Daniel W. Vaughan, in relation to the assignment in question of this case.

Answer. Granted.

3. The plaintiff has failed to sustain the allegation in his bill, that John Vaughan, Sr., was under the influence of whiskey or other stimulants at the time of the execution of the said assignment in question or at any time in his lifetime.

Answer. Granted.

4. The plaintiff has failed to sustain the allegation in his bill that John Vaughan, Sr., was in a stupor and unable to comprehend the nature of any act at the time of the execution of the said assignment.

Answer. Granted.

5. The plaintiff has failed to sustain the allegation in his bill that Daniel W. Vaughan presented this assignment to John Vaughan, Sr., for execution, and that said Daniel W. Vaughan repeatedly asked John Vaughan, Sr., to execute the assignment.

Answer. Granted.

6. Plaintiff has failed to sustain the allegation in his bill that said assignment was executed by said John Vaughan, Sr., when the said John Vaughan was unconscious.

Answer. Granted.

7. The plaintiff has failed to sustain the allegation in his bill that said assignment and note were obtained by said Daniel W. Vaughan from the decedent John Vaughan, Sr., without the consent or knowledge of the said John Vaughan, Sr.

Answer. Granted.

8. The plaintiff has failed to sustain the allegation in his bill that John Vaughan, Sr., was assisted or guided in the actual writing of his name on the said assignment by Daniel W. Vaughan.

Answer. Granted.

9. The plaintiff has failed to sustain the allegation in his bill that John Vaughan, Sr., was removed to the home of Daniel W. Vaughan for a fraudulent purpose and with intent to secure said note and assignment thereof.

Answer. Granted.

10. That the plaintiff has failed to sustain by the character of proof required by law any of the material allegations of his bill.

Answer. Granted.

11. The plaintiff has failed to sustain the allegation in his bill that the assignment in question in this case was made January 27, 1904.

Answer. Granted.

13. That John Vaughan, Sr., was a well informed man, could read and write and that he read the daily papers up to within a day or two of his death.

Answer. Granted.

14. That John Vaughan, Sr., never suffered from any mental weakness or mental incapacity or any impairment of the mind prior to or upon January 14, 1904, the date of assignment in question in this case.

Answer. Granted.

15. That John Vaughan, Sr., was at all times up to the day of his death, mentally capable of transacting his own business.

Answer. Refused as drawn. He was mentally capable of transacting business up to his last illness.

16. There is no evidence in this case to warrant a finding that Daniel W. Vaughan ever suggested or persuaded his father to execute the assignment to him.

Answer. Granted.

17. That John Vaughan, Sr., resided within a few hundred feet of Daniel W. Vaughan, his son, and that he visited said Daniel W. Vaughan more and was visited by the said Daniel W. Vaughan more than by any of his other sons.

Answer. Granted.

18. That said John Vaughan, Sr., visited Daniel W. Vaughan's home almost daily, that his wants and comforts were attended to almost

daily since the death of his wife by Daniel W. Vaughan's children and housekeeper.

Answer. Granted.

19. That John Vaughan, Sr., frequently expressed his intention to give the bulk of his estate to Daniel W. Vaughan.

Answer. Refused.

20. That the assignment of the note in question was the free and voluntary act of John Vaughan, Sr., at a time when he possessed a sound, normal and disposing mind, and said John Vaughan, Sr., was fully acquainted with and fully understood the nature of the act.

Answer. Granted.

21. That said John Vaughan, Sr., delivered said note and assignment to Daniel W. Vaughan January 14, 1904.

Answer. Granted.

22. That the absolute title to said note and money passed to and vested in Daniel W. Vaughan January 14, 1904.

Answer. Granted.

24. That John Vaughan Sr.'s, last illness began January 24th or 25th, 1904.

Answer. Granted.

25. That John Vaughan, Sr., in his lifetime, namely on January 27, 1904, notified M. J. Kettrick, Secretary of the South Scranton Building and Loan Association, that he, the said John Vaughan, Sr., had assigned the note due him from said association to said son, Daniel W. Vaughan.

Answer. Granted.

26. That the said assignment of said note to Daniel W. Vaughan, by John Vaughan, Sr., was an absolute assignment for a good consideration.

Answer. Granted.

27. That the said note never passed to or became part of the estate of John Vaughan, Sr., and the plaintiff in this action has no claim or title to the said note or the money it represents, as administrator of the estate of John Vaughan, Sr., or otherwise.

Answer. Granted.

28. There is ample evidence on the part of the defendant to show the fairness and honesty of the transaction.

Answer. Refused. There is no evidence as to the transaction itself. The presumption is in favor of its fairness, in view of our findings as to the mental and physical condition of the decedent.

29. That there is no evidence in the case to warrant a finding that there was any fraud in any way affecting or relating to the assignment of the note in question.

Answer. Granted.

We find the following conclusions of law:

1. The assignment of the note in question by John Vaughan, Sr., to Daniel W. Vaughan, was valid and passed a good title to it.

2. The fact that no valuable consideration passed and that the assignment was from a father to a son, raises no presumption against its fairness and honesty, and does not place the burden on the assignee to affirmatively show its fairness, and that it was a voluntary act without undue influence.

3. That the bill should be dismissed at the cost of the plaintiff.

We are requested by the parties to make certain findings of law. Those of the plaintiff, with our disposition of them, are as follows:

1. The testimony of Daniel W. Vaughan is incompetent and should be rejected.

Answer. Affirmed, as to matters which occurred during his father's lifetime.

2. A voluntary donation obtained by a person standing in some confidential, fiduciary, or other relation toward the donor, in which dominion may be exercised over him, may be set aside upon the principle of general public policy.

Answer. Affirmed.

3. In the circumstances Daniel W. Vaughan ought not to have accepted so large a gift from his father, even though freely tendered, and he should, in order to prevail in this case, have shown that the transaction was in all respects fair and honest, and in no respect tainted by fraud or undue influence. His hand admittedly guided the palsied hand of the decedent to the signature. His voice awoke from stupor and forced upon the weak and ebbing mind of his father a nod or a yes

to the language implying a gift to him, the speaker. He was thus an active agent in procuring the result of which he purposes to take the benefit. His act is against public policy.

Answer. Refused.

4. Every fiduciary relation implies a condition of superiority held by one person over the other.

Answer. Affirmed.

5. Where a person obtains an assignment from a person physically infirm and mentally weak, and the assignee is a person who stands in a close and confidential relation to the assignor, the assignee is bound to show that the assignment as a gift was righteous and conscientious, and also that the assignor acted intelligently, deliberately and freely, with full information of the amount of his property, the effect upon the estate, the nature of the assignment, and that no advantage was taken of the confidential relation.

Answer. Affirmed.

6. Where a paper has been drawn up by a person for his own benefit, or where he takes a considerable benefit under it, the presumption lies strongly against it, and it requires to be proved by satisfactory evidence dehors the instrument, that it was the free and voluntary act of a capable person, and executed with a full knowledge of its contents and effect. This is a rule of general application to all instruments, the procurers of which are large beneficiaries by virtue of their operation.

Answer. Refused.

7. The defendant, Daniel W. Vaughan, should deliver the note in suit to the plaintiff, the administrator of John Vaughan, deceased; the assignment on the back thereof should be cancelled, and the South Scranton Building and Loan Association should pay to the plaintiff the amount of said note with interest.

Answer. Refused.

Those of the defendants, and our disposition of them, are as follows:

1. The evidence of plaintiff failed to meet the requirement, in quantity or quality, of the law to establish fraud, duress, undue influence or mental incapacity.

Answer. Affirmed.

2. The burden was upon plaintiff to establish by a preponderance of the evidence the material allegations of his bill.

Answer. Affirmed.

3. Relation of father and son, the benefit passing from father to son, does not shift the burden to the son to prove the fairness and honesty of the transaction.

Answer. Affirmed.

4. Assignment of the note in question in this case was a good and valid assignment in law and passed absolute title to note to Daniel W. Vaughan, on January 14, 1904.

Answer. Affirmed.

5. Presumption of law is that assignment was made on the day it is dated, namely, January 14, 1904, and that presumption was not overcome by plaintiff.

Answer. Affirmed.

6. Delivery and acceptance of assigned note took place on January 14, 1904.

Answer. Affirmed.

7. Relations shown to have existed between John Vaughan, Sr., and Daniel W. Vaughan, were not what is known in law as confidential relations.

Answer. Affirmed.

8. Decedent is presumed in law to have had sound mental capacity and there was no evidence in this case to rebut that presumption.

Answer. Affirmed.

9. Gift in question in this case was executed in lifetime of decedent.

Answer. Affirmed.

10. Note or money it represents never passed to estate of John Vaughan, Sr., and his administrator as such had no title or interest in the fund to entitle him to maintain this suit.

Answer. Affirmed.

11. Plaintiff having failed to establish the material allegations of his bill by two witnesses, or one witness and such corroborating circum-

stances as would amount to another, defendant's motion for a decree of dismissal at close of plaintiff's case should have been allowed.

Answer. Affirmed.

12. Mr. Daniel W. Vaughan is a competent witness.

Answer. Refused.

13. Fairness and honesty of the transaction was amply sustained by the defendant's proofs and if the burden was upon him it was fully overturned by evidence which was clear, precise and satisfactory, and amounted to a preponderance of the testimony as well in establishment of the fairness and honesty of the transaction as in establishment of sound mental condition, his testamentary capacity, and his thorough understanding of the transaction, and of his unrestrained and untrammelled exercise to his own mind in making the assignment.

Answer. Refused as drawn.

14. Where it is in the defendant's pleadings that "defendant's relations with said decedent were closer than the relations of any decedent's other children with decedent" and that defendant attended to many of the business affairs of said decedent, and the only evidence in the case of the relations between the two was the testimony of the defendant himself, that he had attended to some of his business affairs, decedent having had very few business affairs, and defendant's work for him consisting of paying his taxes, and paying for coal and few household bills; the evidence being that decedent himself made loan of money in question in this case, which was all the money he owned, that decedent collected his own interest, and held his own security, there being no other testimony tending to establish confidential relations, confidential relations cannot be regarded in law as existing between decedent and defendant, so as to place burden on defendant to establish fairness and honesty of the transaction.

Answer. Refused. The evidence upon which this is based has been stricken out.

DISCUSSION.

The first question for our consideration is whether this bill should be dismissed for the reason that before it was filed there was already pending another suit by the plaintiff against the South Scranton Building and Loan Association, one of the defendants, involving the same

cause of action. A motion was made to strike out the building association as a defendant before the taking of testimony was begun, and after the plaintiff rested a motion was made to dismiss the bill generally for the same reason. The motions were taken under advisement, but should have been refused, and we now overrule them. There was no evidence of the other suit pending when the motions were made, so there was nothing upon which to base them. Nothing further need be said as far as those motions are concerned.

The defendants, in putting in their case, offered the record of the other suit in evidence, and in the files of this case we find a plea in abatement based upon the same ground, which has not been disposed of. The point could only be raised by a plea in abatement and could not be properly passed upon on a trial on the merits. The record shows that the plea in abatement was filed after the bill, answer and replication had been filed, which was clearly too late. A plea in abatement is a dilatory plea and must be interposed before an issue is joined on the merits; and pleading in bar is a waiver of the right to plead in abatement: 1 Cyc. 136; *Potter vs. McCoy*, 26 Pa., 458. This plea should, therefore, be stricken off.

The next question to be considered is the competency of Daniel W. Vaughan, the defendant, as a witness to what took place between him and his father during the latter's lifetime. In sec. 5, clause (e), of the act of May 23, 1887, P. L. 158, it is provided: "Nor where any party to a thing or contract in action is dead, * * * and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased * * * party, be a competent witness to any matter occurring before the death of said party * * *." The "thing or contract in action" here is the alleged assignment of the note held by John Vaughan, Sr., against the building and loan association; the "subject in controversy" is the validity of the assignment to Daniel W. Vaughan; and the right of the decedent in the thing or contract in action has passed, by the act of the law, to his personal representative, who represents his interest in the subject in controversy, viz.: John

Vaughan, Jr., the administrator of his estate. It is, therefore, clear that under the very words of the act, Daniel W. Vaughan is incompetent to testify to matters occurring before his father's death. There are many cases which sustain this view; among them being *Schwab vs Guikinger*, 181 Pa., 8, where it was held that a son claiming against his father's estate is incompetent to testify to an agreement between him and his father relating to the fund in controversy; and *Lavelle vs. Melley*, 27 Supr. Ct., 69, where it was held that a plaintiff claiming certain funds out of a decedent's estate, was not competent to testify to an alleged oral gift made to him by the decedent. The case of *Allen's Estate*, 207 Pa., 325, is not in conflict with these cases. In that case the question at issue was whether a conveyance of a farm by the father to his son was a gift or an advancement. It was conceded that it was either one or the other. In either case the property passed to the son, and when the father died he had no right or interest in it which could pass to his estate. The controversy was between the son and his sister as to whether he should be charged with what he had received, against his share of the estate. The facts brought the case within the exception to the rule of disqualification in the clause of the act of 1887 above quoted. The exception is: "Unless the issue or inquiry be devisavit vel non, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses." In the *Allen* case the property concededly had passed, while in this case the very issue is to determine whether the property had passed. The testimony of Daniel W. Vaughan, as to any matter occurring during his father's lifetime, must, therefore, be stricken out and disregarded.

As to the merits of the case we are of the opinion that they are with defendants. The bill alleges that the assignment was made on the 27th of January, 1904, the day preceding the death of John Vaughan, Sr., while there is no evidence whatever to rebut the presumption that it was made on the day it purported to be made, viz., the 14th of January, 1904. There is no evidence in the case to warrant us in finding that on that date he was not perfectly normal both physically and mentally. The bill alleges that at that time, and for sometime

prior, he was mentally and physically unable to transact any business owing to old age and his critical illness, but the evidence shows that he was not ill at all until four days before his death. The bill avers that within a day or two of the time the alleged assignment was made Daniel W. Vaughan fraudulently, and with intent to secure the note and an assignment of it, induced his father to make his home with him; that at the time the assignment was made John Vaughan, Sr., was being given large doses of whiskey and other stimulants and medicine, so that he was entirely unable to recognize those with whom he was well acquainted; that while he was lying in a stupor Daniel W. Vaughan presented the assignment to him for execution, and repeatedly asked him to execute it, until his father, "being so weakened both physically and mentally as to be willing to do anything suggested to him by another, and without being conscious of what he was assenting to, nodded his head affirmatively, and in that manner, his hand being assisted and guided by Daniel W. Vaughan, the name John Vaughan, Sr., was signed to said instrument"; and "that said Daniel W. Vaughan, while his father was in the condition just stated, and without the knowledge or consent of his father, obtained possession of said note." None of these averments were sustained by the evidence in the slightest degree, nor was there any evidence offered by the plaintiff to attempt to sustain them.

The case is before us on bill, answer and replication, and with the testimony of Daniel W. Vaughan stricken out, we have a case of a man of eighty years old assigning to one of his sons a note for \$3,350, being nearly one-third of his entire estate, by an assignment in the son's handwriting, signed by the father with a firm hand, while in good health and of sound mind. He lived alone across the street from his son for some months before his death. He was not taken to the son's house until he was taken ill, some four days before he died, and ten days after he had assigned the note to him. There was no confidential relation existing between them different from that usually found to exist between father and son, and no evidence whatever as to how the assignment came to be made. The allegations in the answer of Daniel W. Vaughan as to how the transaction took place are denied by the replication and cannot be taken as true; and the testimony of the defendant

upon the subject being struck out, we have no evidence whatever upon the matter.

Under these circumstances what is the conclusion to be reached? That a man of sound mind may do as he sees fit with his property, provided he do so freely, intelligently and voluntarily, without any undue influence or persuasion, cannot be doubted. The relationship between the parties raises no presumption against the validity of the gift. "There is nothing in the relation of parent or child, or other near relation, to preclude one from accepting a benefit from the other in the shape of a gift, or of a contract upon more advantageous terms than would have been granted to a stranger, and the fact that such a gift has been conferred, or contract made, will not warrant an inference that it has been procured by undue influence. Unless there is something suspicious in the circumstances, or the nature and amount of the gift is such that it ought not to have been accepted even if freely tendered, the donee will not be called upon to show that the transaction was in all respects fair and honest and in no respect tainted by fraud or undue influence": Trunkey, J., in Worrall's Appeal, 110 Pa., 365. Mr. Justice Green, in delivering the opinion of the court in Carney vs. Carney, 196 Pa., 34, said: "It is to be observed that, in the present case, the deed was made by a father to a son, and in that particular relation the rule as to the burden of proof of the fairness of the transaction is relaxed, and it is held that a child may accept a gift from a parent without being subject to an obligation to make affirmative proof that the grantor was fully acquainted with the character of the act in which he was engaged and that the conveyance was fair and conscionable." To the same effect are the cases of Crothers vs. Crothers, 149 Pa., 201; Simon vs. Simon, 163 Pa., 294; Knowlson vs. Flemming, 165 Pa., 10. and many other cases which we might cite.

We find no evidence to take this case out of the class covered by these authorities. The fact that the assignment is in the handwriting of the defendant is no doubt a circumstance to be considered, but standing alone it is not a very important one. It is not of itself sufficient to cast the burden of proof upon him: Opinion of Mr. Justice Green, in Yardly vs. Cuthbertson, 108 Pa., 445.

Let a decree nisi be entered in favor of the defendants, and notice be given to the parties sec. reg.

In the Court of Common Pleas of Lackawanna County, No. 10, May Term, 1903.

IN EQUITY.

PROCEEDINGS TO ASCERTAIN AND APPORTION THE INDEBTEDNESS OF LACKAWANNA TOWNSHIP.

The Township of Lackawanna vs. The Borough of Moosic.

In a proceeding to ascertain the indebtedness of a township, claims in judgment against a township recovered in suits before justices of the peace, aldermen, or in the Court of Common Pleas, can be attacked and inquired into on three grounds: (1) That they are based upon claims accruing to supervisors during their term of office, or that they are based upon orders issued by auditors of the township. (2) That there is fraud in them. (3) That the indebtedness represented by them was contracted after the two per centum limitation of indebtedness, as prescribed by the constitution and the Act of 1874, had been reached. In all other respects the judgments are conclusive.

The law wisely gives to a judgment a certain effect of finality or conclusiveness which can be disturbed only under exceptional circumstances. Were this not so, nothing would ever be determined and there would be no end to litigation. It is of no moment whether the judgment is in the common pleas or before a justice as long as the court which renders it is a court of competent jurisdiction.

If the judgment is in a justice's court the law provides a way for a review of the proceedings. The defendant may appeal to the common pleas and have the case tried again on its merits, or he may question the irregularity of the proceedings by certiorari. If he does neither, the judgment is conclusive as to him; and it is conclusive as to third parties except where there is fraud or collusion.

It is a general rule that a judgment or decree of a court of competent jurisdiction cannot be impeached collaterally. The sole exception to this rule is, that when such judgment or decree is given in evidence against third persons, they may aver and prove that such judgment or decree was procured by fraud or collusion between the parties to it. But this exception does not apply to parties or privies who have already been heard, or have had an opportunity to be heard, in that proceeding upon that same alleged fraud. As to them the record is conclusive in any collateral proceeding. Their remedy, if any, is to apply to the same court in which such judgment was rendered to open or vacate it, or by writ of error or appeal.

Creditors may attack judgments on the ground of fraud so far as the fraud affects their interest as creditors, although the judgments remain valid in all other respects.

In a proceeding against a township a taxpayer is a third party and has the right to attack judgments obtained against the township through fraud and collusion.

Mr. John P. Quinnan, for plaintiff.

Mr. John Bonner, for Borough of Moosic.

Mr. John M. Harris, for Borough of Taylor.

Mr. C. P. O'Malley, of the firm of Willard, Warren & Knapp, for Delaware, Lackawanna & Western Railroad Co.

Opinion by Edwards, P. J., September, 1906.

By a decision of the Superior Court the decree incorporating the borough of Moosic, formerly a part of Lackawanna Township, became effective on January 17, 1900. Subsequently, in October, 1901, a portion of the same township was annexed to the borough of Taylor. Therefore, Moosic borough and the said annexed portion must each pay its proportionate share of the indebtedness of Lackawanna township, as it existed at the dates mentioned.

The proceedings in this case are brought under the provisions of the act of June 12, 1878, P. L. 184, and involves an adjudication of all claims against the township, except those in pending actions for tort. While the case is entitled "The Township of Lackawanna vs The Borough of Moosic," and while the act of assembly provides for the apportionment as well as the ascertainment of the indebtedness, the report of the auditor deals only with the ascertainment of the township's debts. We advisedly limited the scope of the auditor's duties to the ascertainment of the indebtedness, saving the question of apportionment for supplemental proceedings. We did this for the reason that the question of the indebtedness of the township presented many complications involving charges of irregularities and gross frauds as we had already found out in other proceedings taken for the purpose of marshaling the claims against the township as provided by the act of 1864. The commissioner appointed for that purpose was confronted during the investigation with such overwhelming proofs of fraud that he deemed it his duty to pass upon the validity of each claim, and in his report he disallowed claims amounting to nearly twenty thousand dollars. On exceptions to the commissioner's report we were constrained to set it aside because he had exceeded the scope of his powers under the said act of assembly. This was the first report filed by him. Subsequently he presented another report marshaling the indebtedness of the township. Exceptions were filed to this report, and, in an opinion filed in that case we dismissed the exceptions without prejudice, and we declined to make an order for a special levy until the actual indebtedness of Lackawanna township was ascertained judicially by a tribunal authorized under the law to pass upon the validity of the claims against the township.

For a few years the matter of ascertaining the indebtedness of the

township remained in abeyance. In the meantime the process of dismembering went on. Moosic, following the example of Taylor, became a borough; later, another part of the township was annexed to Taylor, and later still, as the records of our courts show, more township territory has been annexed to the city of Scranton. It is evident that the desire to escape municipal confiscation and bankruptcy resulting from extravagant and corrupt municipal government, was as potent an influence in causing the dismemberment of the township as the desire to secure the benefits of a more advanced form of government. Of course the seceding territories must pay their proper share of the township debt.

Under all the circumstances it was a proper precaution to confine the present investigation to the ascertainment of the indebtedness of the township. As soon as this question is settled the apportionment of the indebtedness will be an easy matter and will not be attended by any complication.

The auditor, whose report is before us on exceptions, has done his work well. The testimony is voluminous—over 2200 typewritten pages—and the report covers more than 100 pages, besides answers to about 600 requests for findings of fact and of law. There are nearly 400 exceptions of all kinds.

The claims presented before the auditor aggregate \$60,000. Many of the claims are fraudulent and are, therefore, disallowed, and many more fall by the wayside because the two per cent. limit on the indebtedness had been reached before the claims had their existence as township debts. The fraud, as found by the auditor, assumes many forms. Forged orders; orders paid and re-circulated; orders unlawfully issued by auditors; orders given for work done on private property; one order given for charity; orders drawn by supervisors to themselves for the work of their own horses on the roads, and other orders illegal for some other reasons—these are the various phases of fraud as disclosed by the evidence. It is useless to further characterize the municipal mismanagement evident in the affairs of Lackawanna township for several years, especially during the years 1897 and 1898. We agree with the auditor when he states that "the case is one which demands the appli-

cation of the keenest scrutiny and unhesitating, unfaltering rejection wherever fraud appears."

Of the multitudinous exceptions presented one only is worthy of consideration and discussion. It is based upon the auditor's eighteenth conclusion of law, which is as follows:

"That in this proceeding claims in judgment against the township of Lackawanna, recovered in suits before justices of the peace, city aldermen, or in the Court of Common Pleas, can be attacked and inquired into on three grounds: (1) That they are based upon claims accruing to Supervisors during their term of office, or that they are based upon orders issued by Auditors of the township. (2) That there is fraud in them. (3) That the indebtedness represented by them was contracted after the two per centum limitation of indebtedness, as prescribed by the Constitution and the Act of 1874, had been reached. In all other respects the judgments are conclusive."

It would seem, as a matter of first impression and on the basis of common, every-day honesty, that in an investigation to ascertain the indebtedness of a municipality, there should be no doubt as to the correctness of the auditor's conclusion; that as between fraudulent claims in judgment and honest claims not in judgment, the fact that the fraudulent claims have been prosecuted to judgment should make no difference in an inquiry as to the amount of the actual indebtedness of the township and that the taxpayers should not be called upon to pay more than the township honestly owes. Nevertheless, the law wisely gives to a judgment a certain effect of finality or conclusiveness which can be disturbed only under exceptional circumstances. Were this not so, nothing would ever be determined and there would be no end to litigation. It is of no moment whether the judgment is in the common pleas or before a justice, as long as the court which renders it is a court of competent jurisdiction. If the judgment is in a justice's court, as most of the judgments in this case are, the law provides a way for a review of the proceedings. The defendant may appeal to the common pleas and have the case tried again on its merits, or he may question the regularity of the proceedings by certiorari. If he does neither, the judgment is conclusive as to him; and it is conclusive as to third parties except where there is fraud or collusion.

We shall examine briefly the grounds on which the auditor's conclusion is based.

1. *The two per cent. limitation of indebtedness.* A very large proportion of the claims disallowed by the auditor were for debts incurred after the constitutional limitation had been reached. To ascertain this fact the auditor was bound to go behind a large number of judgments. He could get the information in no other way. The dates of the judgments did not indicate the time of the origin of the claims. One claim might have been prosecuted to judgment immediately after it became due, while another claim, not in judgment, was several years old and was within the two per cent. limit. We find an incidental reference to this question in Plains Township's Appeal, 21 Sup. Ct. Rep., on page 72, a case which, like many other cases cited on behalf of the exceptants, arose under the Act of 1864 (P. L. 162), providing for the collection of township debts and giving the court of quarter sessions power to order a special levy. It was decided in that case that a judgment against a township could not be attacked in a collateral proceeding in the court of quarter sessions, in the absence of jurisdictional defects, and that the proceeding under the Act of 1864 presupposes that the indebtedness had been previously ascertained. The Act of 1878, under the provisions of which the auditor in the present case was appointed, is of greater scope and provides a tribunal or method for the ascertainment of township debts, but does not, however, disturb the general principles of law fixing the status of a final judgment. In discussing the question of the two per cent. limitation where the interests of rival judgment creditors are concerned, the Superior Court says: "The mere fact that the aggregate of the judgments exceeded two per cent. of the assessed value of the taxable property of the township was not conclusive of the validity of the demands upon which the judgments were founded; the original debt may have been incurred before the constitutional limitation went into effect, or it may have been incurred with the assent of the electors, at a public election in the manner provided by law. The assessed valuation of the taxable property may have been much higher at the time the township incurred this indebtedness, or the township may have been divided and taxable property thus taken from it since the debt originated; an impoverishment or division

of the township would not invalidate its existing obligations. We are of opinion that the judgments were conclusive of the liability of the township to pay." The obstacles suggested in the opinion are not to be found in the present case. The auditor has found that there was no election to increase the indebtedness; he gives the assessed valuation at the time the indebtedness was incurred and, he has ascertained the date of the claims so as to decide whether they are inside or outside the constitutional limitation. As we have already stated, the Superior Court has only incidentally touched upon the question before us; but we are prepared to decide the matter definitely, and we state that in order to determine what claims are protected by the constitutional provision and what claims are not so protected, the auditor had the right to investigate the claims upon which the judgments were based and to disallow those where the indebtedness was incurred after the limitation had been reached. The conclusion we have reached disposes of many of the exceptions independently of the question of fraud.

2. *Fraud.* The auditor has excluded from the schedule of debts all fraudulent judgments, or parts thereof; that is, he has thrown out all dishonest claims, whether in judgment or not. This he had a right to do. Any other course would be a perversion of justice and a premium on fraud. "It is a general rule that a judgment or decree of a court of competent jurisdiction cannot be impeached collaterally. The sole exception to this rule is, that when such judgment or decree is given in evidence against third persons, they may aver and prove that such judgment or decree was procured by fraud or collusion between the parties to it. But this exception does not apply to parties or privies who have already been heard, or have had an opportunity to be heard, in that proceeding upon that same alleged fraud. As to them the record is conclusive in any collateral proceeding. Their remedy, if any, is to apply to the same court in which such judgment was entered to open or vacate it, or by writ of error or appeal." *Otterson et al. vs. Middletown*, 102 Pa., 78; *Jackson et al. vs. Summerville*, 13 Pa., 359.

3. *Who are the third parties in these proceedings?* There can be no doubt that creditors are third parties. Every honest claimant has the right to attack every fraudulent judgment in a proceeding involving the adjudication of all claims against the township. It is true that the

township or the borough as such may have no standing to attack a fraudulent judgment. They have, or have had, their remedy; but this does not bar creditors from attacking the judgments on the ground of fraud so far as the fraud affects their interests as creditors, although the judgments remain valid in all other respects. We hold also that taxpayers are third parties. This is the position taken by the auditor. While the present authorities of the township and of the borough appeared before the auditor and repudiated the fraudulent judgments, it was the active intervention of a large taxpayer—the Delaware, Lackawanna and Western Railroad Company. And in the present proceeding we know of no reason why a taxpayer is not a third party having the right to attack the judgments obtained against the township through fraud and collusion. We are satisfied that the conclusions reached by the learned auditor on the legal questions involved in this investigation are correct.

As stated in the first part of this opinion the auditor has not apportioned the indebtedness between the township and the borough of Moosic. For the reasons there stated it was desirable that the indebtedness should be first ascertained. The matter of apportionment can be easily decided. That must be done in this case either by an auditor or by the court itself. The records of our court show that since Moosic borough was formed, another portion of the township of Lackawanna has been annexed to the borough of Taylor, and that since that time the part of the township known as "Lincoln Heights" has been annexed to the city of Scranton. It would seem desirable that the financial relations of these several territories should be, if possible, adjusted in one proceeding; but that matter is not before us now. It may be that the part of the township indebtedness falling on the territory annexed to Taylor borough could be determined in this proceeding. This could be done by agreement to amend the bill in this case; but all these matters are for future consideration. The only question before us now is the report of the auditor on the indebtedness of the township at the time the decree incorporating Moosic borough became effective in accordance with the terms of the order made by the Superior Court.

The auditor finds the indebtedness of the township to be \$19,827.94. The claims allowed by him amount to that sum. The

claims disallowed amount to a larger sum. The auditor gives also a schedule or statement of the costs of the proceedings in No. 466, June Sessions, 1898. These costs amount to \$5,416.70; and he gives the costs of the present proceedings, amounting to \$6,783.26. Including an allowance of five per cent. for collection, the total amount, according to the auditor's report, which must be raised by special tax, aggregates \$33,629.30.

We have decided to make reductions in some of the items of costs in both proceedings. We are aware of the enormous amount of labor expended in both investigations, particularly in the second; but we think some of the charges ought to be reduced. At any rate, we assume the responsibility of making the reductions and to make such allowances as, in our judgment, seem reasonable under the circumstances. In the proceedings No. 466, June Sessions, 1898, the commissioner's fees are reduced from \$3,369.00 to \$2,500; the stenographer's fees are reduced from \$750 to \$500; the item of \$940 for attorney fees is disallowed, and the other items are approved. In the proceedings brought to No. 10, May Term, 1903, the auditor's fees are reduced from \$4,000 to \$3,000, and the stenographer's fees from \$2,068.05 to \$1,500; the other items are approved.

Therefore, the final schedule made by the auditor is changed so as to read as follows:

Total of all claims allowed, with interest upon judgments to April 12, 1900, inclusive (exclusive of costs of this and preceding investigation).....	\$19,827.94
Costs of the proceedings In Re. Indebtedness of Lackawanna Township, No. 466, June Sessions, 1898.....	3,366.70
Costs of this proceedings, as per statement.....	5,215.21
Total of all claims and costs.....	\$28,409.85
To this is to be added the sum of 5% for collection of the special tax and its application to the payment of the foregoing stated and allowed claims.....	1,420.00
Total amount to be raised by special tax.....	\$29,829.85

In accordance with the views expressed in this opinion we overrule all the exceptions filed to the report, except the one objecting to the

item of \$940 for attorney fees. We confirm the auditor's report finally, and we note an exception in favor of each claimant who has filed exceptions.

In the Court of Common Pleas of Lackawanna County, No. 889, March Term, 1906.

QUO WARRANTO.

Commonwealth ex rel., W. R. Lewis, District Attorney vs. John F. Jones, et al.

Section 4 of the Act of June 1, 1883, P.L. 54, provides: "That the members of town councils shall have power to fill in any vacancy which may occur therein by death, resignation, removal from the borough, or otherwise."

Held: That notwithstanding the comprehensive term "otherwise" it cannot be said that absence from one or more meetings of a council caused by sickness, accident, temporary absence from home, or other similar causes would justify a council in declaring a vacancy.

It is a well known rule of construction that in a statute a general word following particular and specific words of the same nature as itself often takes its meaning from them, and it is often presumed to comprehend only things of the same kind as those designated by them, unless there is something to show that a wider sense was intended.

Mr. John H. Bonner, for plaintiff.

Messrs. F. M. Lynch and M. J. Martin, for defendants.

Opinion by Edwards, P. J., September, 1906.

This case, like that brought to No. 888, March Term, 1906, was tried before a judge without a jury and it relates to the legality of the organization of the council of the borough of Olyphant. The question of law involved in the Archbald borough case (No. 888 March Term) is also to be considered in the present case; but in this latter case there is also to be determined the right of the council to declare and fill certain vacancies. We make the following findings of fact:

1. The borough of Olyphant is divided into four wards, each entitled to three councilmen.

2. At the February election, 1906, the following persons were elected councilmen of the borough for the term of three years:

J. G. Nalevanko, 2d ward.

Michael Curran, 3d ward.

John Lawler, 4th ward.

Among other who were old members of the council, who had been

elected for three year terms and whose terms had not expired last March, were the following persons:

M. J. Nealon, 1st ward.

John F. Jones, 2d ward.

M. J. O'Holleran, 3d ward.

Patrick McClaren, 4th ward.

3. The councilmen, old and new, named in the last paragraph, being altogether eight in number, met on the first Monday in March, 1906, and organized the borough council, and they elected certain of the defendants to the borough offices.

4. Another body of men, seven of whom were elected as councilmen from various wards of the borough for terms of one year in February, 1906, met with other old members and organized a borough council. The main contention of this body of men was that seven of them having been elected for the term of one year each, they, therefore, constituted the legal council of the borough. We are not concerned now with this organization. The question to be determined is the legality of the organization of the other council and the title of the several defendants to their respective offices. The writ in this case is sued out by the commonwealth at the relation of the district attorney, and for this reason our inquiry is necessarily confined to the standing in law of the defendants only. If we decide that the council organized by the councilmen who are named among the defendants is the legal council the whole controversy as to this point is settled.

5. We come now to another question which is not and could not be raised in the Archbald borough case. It appears that the eight members named in paragraph two, after organizing the council and electing the various officers on the first Monday of March, 1906, adjourned to meet March 12, 1906, at which meeting the seats of the four absent councilmen were declared vacant and other men were elected to fill the vacancies. We insert here the part of the minutes of the meeting of March 12th relating to the filling of these vacancies:

"Lewrence Howard, William McDonald and William Mosely having refused to attend the meetings of council, and in order that the wards which they represent should have their full representation as provided by law, a motion was made that their seats be declared vacant

and their successors be elected, resulting as follows: For the motion, (eight votes). The motion was declared carried. A motion that John Sweeney be elected the successor of P. A. Cannon, and that Thomas O'Hara be elected the successor of Lawrence Howard from the first ward, resulted as follows: For the motion (eight votes, naming them). The motion was declared carried. A motion that John P. Williams be elected the successor of William McDonald in the second ward, and that Joseph Adams be elected the successor of William Mosely in the fourth ward, resulted as follows: For the motion, (eight votes, naming them.)"

CONCLUSIONS OF LAW.

1. The legal regular term of a councilman of the borough of Olyphant is three years.

2. The organization of the borough council effected by the eight councilmen named in our second finding of fact, on March 5, 1906, was legal, and the persons elected by the council so organized to certain offices were legally elected to said offices.

3. The following councilmen named in the suggestion and writ in this case, to wit: J. G. Nalevanko, John Lawler, John F. Jones, M. J. O'Holleran, Edward Ingoldsby and Patrick McClaren were lawful councilmen of the borough of Olyphant on the first Monday of March, 1906. The names of M. H. Nealon and Patrick Curran, the other two lawful councilmen, do not appear in the suggestion and writ.

4. Judgment should be given for the commonwealth in part and for the defendants in part. Ten of the defendants are entitled to judgment in their favor. These are the six councilmen and the four persons appointed to their respective offices. Judgment of ouster should be given against the four councilmen appointed to fill vacancies.

DISCUSSION.

There is no question as to the right of the eight councilmen named in our second finding of fact to hold their offices. The decision of the Supreme Court in *Hayes vs. Sturges et al.*, not yet reported, is conclusive on this point. Therefore we have found as a conclusion of law that these eight councilmen who met on March 5, 1906, and organized the borough council were legally entitled to their offices, and that the council so organized is the legal council of the borough of Olyphant.

This conclusion disposes also of the right of those whom the said council elected to fill certain offices. The remaining and, to our mind, the somewhat difficult question to be determined, relates to the filling of the four vacancies by the council on March 12th, one week after the organization of the council.

Section four of the Act of June 1, 1883, P. L. 54, provides, "that the members of town councils shall have power to fill any vacancy which may occur therein by death, resignation, removal from the borough, or otherwise." Our attention is called to the well known rule of construction that in a statute a general word following particular and specific words of the same nature as itself often takes its meaning from them, and is often presumed to comprehend only things of the same kind as those designated by them, unless there is something to show that a wider sense was intended. There is no doubt as to the soundness of this rule. It is based on common experience as well as on many precedents. The difficulty we find is in the application of the rule to the facts of this case. The act of assembly specifies that vacancies may be created by death, resignation, removal from the borough, or "otherwise." It is contended that absence from the meetings of the council, or the refusal of a councilman to attend the meetings create a vacancy which the council may fill. Conceding this proposition to be correct and that it is covered by the term "otherwise" would absence for any cause from one meeting justify a council in declaring the absentee's seat vacant? Is the rule allowing councils to declare and fill vacancies as severe and stringent as is claimed in this case? Are councils to be sustained by the courts in such summary and arbitrary action? Let us examine the causes for which vacancies may be declared. The "death" of a councilman, of course, creates an immediate vacancy. So does the "resignation" of a councilman as soon as it is accepted. Resignation is a voluntary and affirmative act and is positive notice to the council justifying it in declaring a vacancy. "Removal from the borough" also definitely and permanently incapacitates a man from being a member of the council. However, it cannot be said that absence from one or more meetings of a council caused by sickness, accident, temporary absence from home, or other similar causes, would justify a council in declaring a vacancy. One man is called to Europe; another to Cali-

fornia; another is summoned to a distant part of the country by reason of the sickness or death of a relative. In such cases councils do not and should not act summarily. The general rule should be that such conduct as amounts to an abandonment of the office of councilman, persistently neglecting to attend the duties of the office, continued absence from the meetings without reasonable cause, or any other act of a similar character, would justify a council in declaring a vacancy. We do not agree with the proposition advanced by the commonwealth that councils cannot declare a vacancy on the ground of mere absence from the meetings. The term "otherwise" in the statute is sufficiently broad to cover persistent absence from meetings of council, or an expressed refusal to attend the meetings.

It is claimed by counsel for the defendants that the conduct of the four councilmen whose seats were filled by the council was of such a voluntary and affirmative character as to amount to an intentional and unlawful refusal on their part to attend the meetings of the council which we now declare to be the legal body. Do the facts sustain this position? It must be remembered that before the time of the election in February, 1906, and of the organization of the council on the first Monday in March, our court had rendered the decision that under the act of 1883 the term of a councilman in boroughs divided into wards was one year. Following this decision several persons, seven at least, were elected in several of the wards of the borough of Olyphant. The four councilmen whose seats were declared vacant by the other council, and, as we understand it, who claimed to hold over because nobody was legally elected in their places, saw fit to join their fortunes with the seven one-year men, believing that they constituted the legal council. The result was that there were two rival councils in the borough, both organizing on the first Monday in March, one composed of eight three-year men and the other of seven one-year men joined by the four men who were afterwards unseated by the other council. It is only fair to assume that these four councilmen were honest and conscientious in their belief that the council composed of the one-year men was the legal council, the courts having so decided. It at least can be said that their action was not capricious and wilful. They had the right to believe that the other council was illegal. The idea of turpitude, moral or legal,

or of neglect of duty, is entirely wanting in the situation. It was at best a mistake of judgment, participated in by the court as well as by the councilmen.

The minutes of the now legal council of the March 12th meeting show very little regard for the rights of the four councilmen mentioned. Their offices were taken away with scant ceremony. The resolution states that Howard, McDonald and Mosely having refused to attend the meetings of the council their seats be declared vacant. As to P. A. Cannon's seat the only motion made was that Sweeney be declared the successor of Cannon. All this was done without notice to the parties interested. We think this action of the council was summary, arbitrary and an unwarranted use of power. We think there is no question as to our jurisdiction. While we cannot control borough councils in their choice of persons to fill vacancies we can set aside their unlawful action in declaring vacancies without warrant of law.

It is not necessary to indicate what should have been done under the conditions prevailing in the borough of Olyphant. We would suggest, however, that after the Supreme Court on April 26, 1906, had handed down its decision reversing our judgment in the Old Forge borough case, it would have been a proper exercise of power and discretion to notify the four councilmen who had been unseated to appear at the next meeting of the board to take their seats, and if they failed to do so and still persisted in absenting themselves without reasonable cause, then to declare their seats vacant and appoint others to fill their places.

In accordance with our findings of fact and conclusions of law we enter judgment as follows:

1. We adjudge and decree that John Sweeney, Thomas O'Hara, John P. Williams and Joseph Adams are each, separately, guilty of usurping and unlawfully holding and exercising the office of councilman of the borough of Olyphant, and we adjudge that a judgment of ouster be entered against each of the four defendants herein and above-named, and that each of said defendants be excluded from said office.
2. We direct judgment to be entered against the commonwealth and in favor of the following defendants, viz.: J. G. Nalevanko, John

F. Jones, John Lawler, Patrick McClaren, M. J. O'Holleran and Edward Ingoldsby.

3. We direct that the county of Lackawanna pay the costs of these proceedings.

We direct the prothonotary to give notice of our decision forthwith to the parties or their attorneys; and, if no exceptions be filed thereto within thirty days from the date of service of such notice we direct the prothonotary to enter judgment in accordance with our decision.

In the Court of Common Pleas of Lackawanna County, No. 6, May Term, 1905.

IN EQUITY.

ADJUDICATION.

The Borough of Dunmore vs. The City of Scranton.

A street railway company, having the right to lay out and construct a railway from one point to another "with one or more tracks" by laying out and building a single track road and operating it as such for a long term of years, does not exhaust its power and right to lay a double track when the necessities of its business and the traveling public require it. It is a matter of common knowledge that the laying of a street railway track does not require any 'opening, ditch, trench or excavation.'

Mr. J. W. McDonald, Borough Solicitor, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Kelly, A. L. J., June, 1906.

From the pleadings and the evidence in the case we find the facts as follows:

1. The plaintiff borough is a municipal corporation created under the laws of the Commonwealth.

2. The defendant is a street railway company engaged in operating a street railway line from the central part of the city of Scranton over certain of her streets into and through a portion of the borough of dunmore, over certain of her streets, including South Blakely street.

3. The defendant company was formerly known as the People's Street Railway Company of Luzerne County, the name of which was changed to the Scranton Railway Company by proceedings in the Court of Common Pleas of Lackawanna County, to No. 678 November Term, 1896, "In Re. Change of name of The People's Street Railway Com-

pany of Luzerne County." On December 7, 1896, a decree was made changing the name to The Scranton Railway Company.

4. The People's Street Railway Company of Luzerne County was incorporated by a special act of the Legislature approved 23d March, 1865, (P. L. 1866, p. 1199). The act is as follows:

"An act to incorporate the People's Street Railway Company of Luzerne County.

"Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That A. B. Dunning, D. R. Randall, Geirge Tracy, A. Bennett and Samuel Raub, their associates, successors or assigns, be and they are hereby constituted a body politic and corporate, with perpetual succession, by the name, style and title of the People's Street Railway Company of Luzerne County, and as such shall have the right to lay out and construct a railway, with one or more tracks, with turnouts and sidings, from or near Scranton, to Providence, Hyde Park and Dunmore, through any streets or roads, or use or construct any bridges, selecting any routes, between the places indicated, that they may deem advisable, and to cross at grade, or connect with any other railway now constructed, or that may hereafter be constructed, and to carry passengers and freight along such routes and streets as may be used by said railway; and they shall have the right to charge such rates of fare as the directors of said company may from time to time determine upon, and to equip said road, and to purchase, hold and convey such real estate, and erect thereon such buildings and improvements, as may be necessary for the purposes contemplated in this act.

"Section 2. That the capital stock of said company shall consist of five hundred shares, of one hundred dollars each, with privilege of increasing the same from time to time, as the directors may determine; and that said company shall have power to borrow money in any amount, not exceeding one-half of its authorized capital stock, and for the purpose of securing the re-payment of the same, with such interest as may be agreed upon, to issue bonds, and secure the same by mortgage or otherwise; Provided, however, that no bonds shall be issued for

a sum less than one hundred dollars, against the collection of which no plea of usuary can be interposed.

"Section 3. That the parties hereinbefore named, or any three of them, may proceed with or without notice, to organize said company, and obtain subscriptions, to the capital stock thereof; and after ten per cent. has been subscribed, and five per cent. paid in, on said subscriptions, to the attending commissioners aforesaid, the subscribers may proceed to elect a board of five directors, who shall serve until the first Tuesday in November following, or until their successors are elected, and the stockholders shall annually thereafter, on the first Tuesday of November, elect a similar board of five directors, to serve for one year, or until their successors are elected; and if for any reason said election shall not be held, at the time indicated, then another shall be appointed by the directors, after public notice of two weeks has been given in one newspaper published in the county; and the directors shall have power to fill all vacancies in their board, whether from death, resignation or otherwise, but no person shall act as director who is not a stockholder.

"Section 4. That the company may commence said railway at any time within three years from the passage of this act, the completion of any one mile thereof perpetuating all the rights hereby granted.

"Section 5. That the said directors shall have the power to appoint a president, treasurer and such other officers as they may deem necessary; and in all elections for directors, and at other meetings of stockholders, each share shall entitle the holder thereof to one vote; but no stockholder or assignee shall vote upon any share of stock on which an instalment is due and unpaid.

"Section 6. That the said company shall be subject to all the provisions, and entitled to all the privileges, of an act regulating railroad companies, approved the nineteenth day of February, Anno Domini one thousand eight hundred and forty-nine, so far as the same are not altered and supplied by this act.

"Section 7. That the said company shall pay a bonus to the state for the privileges hereby granted, of one-half of one per cent. on its capital stock, and increase as paid in, payable in four equal annual instalments thereafter, and such taxes on dividends as is or may be provided by law; and the stockholders of said company shall be individ-

ually liable for all debts due mechanics, workmen and laborers employed by said company, and for all materials and provisions furnished to said company, to be sued for and collected as is provided in the twelfth, thirteenth and fourteenth sections of the act incorporating the Lackawanna Coal and Iron Company, approved the fifth day of April, Anno Domini one thousand eight hundred and fifty-three.

"Arthur G. Olmsted, Speaker of the House of Representatives.

"William J. Turrell, Speaker of the Senate.

"Approved the twenty-third day of March, Anno Domini one thousand eight hundred and sixty-five. A. G. Curtin."

5. Within three years from the passage of the act of incorporation above set forth The People's Street Railway Company of Luzerne County, constructed and laid a single track railway from the City of Scranton to Dunmore corners over certain streets, including South Blakely street, and continued to operate with a single track until a short time before the plaintiff's bill was filed, when The Scranton Railway Company proceeded to construct and lay a double track railway over this street in question. No double track road was laid within three years from the passage of the act of incorporation.

6. Before the final hearing the double track had been entirely completed which made a practically complete double track line from the central part of the city to the central part of the borough; being of substantial advantage to the defendant and to the traveling public, without obstructing the general travel over the street in question to any applicable extent.

7. An ordinance was passed by the Borough Council and approved by the Burgess on February 16, 1901, as follows:

"An ordinance regulating excavations in streets and requiring permits therefor.

"Sec. 1. Be it ordained, etc., that hereafter no company, corporation, person or persons shall make any opening, ditch, trench or excavation in any street, lane or alley of the borough without first having obtained a written permit therefor from the street commissioner.

"Sec. 2. That said permit shall state the purpose for which said opening, ditch, trench or excavation is intended, and the length of time the same shall be allowed.

"Sec. 3. Any company, corporation, person or persons digging up the streets, lanes or alleys as aforesaid or making excavations or openings in the same shall at all times keep the same so guarded as to insure public safety, and during the night time shall keep one or more lights at such places opened or excavated as aforesaid.

"Sec. 4. Any company, corporation, person or persons making openings or excavations in any street, lane or alley as aforesaid shall after the work is complete leave the same in as good condition as before.

"Sec. 5. All excavations or openings as aforesaid shall be done under the supervision of the street commissioner.

"Sec. 6. Any company, corporation, person or persons violating any of the provisions of this ordinance shall be subject to a penalty of ten dollars for each and every neglect or refusal to comply with its provisions, to be recovered as like penalties are now by law recoverable.

"Passed by council February 16, 1901. Approved February 16, 1901. Victor Burschel, Burgess."

7. No permit was applied for or issued to the defendant under the provisions of the ordinance above set forth.

From the facts as set forth in our finding we find the following Conclusions of Law:

1. The borough ordinance set out in our seventh finding of fact does not affect the question of the defendant's right to enter upon the street in a proper manner to lay a double track, and the defendant required no permit under its provisions.

2. The defendant had the right under the provisions of its charter and under the law to lay the double track in question.

3. The plaintiff's bill should be dismissed and the costs paid by the plaintiff.

DISCUSSION.

The questions involved in this case were all raised in its preliminary stages upon an application for a preliminary injunction. Judge Edwards refused the writ in an opinion filed in which he reviewed the Pennsylvania authorities at length, and in his opinion he stated that while it would be proper to refuse the application because no clear right was shown, he was prepared to go further and state that on the merits of the case the plaintiff was not entitled to an

injunction. As no evidence was offered by the plaintiff at the final hearing, except that which had been taken at the preliminary hearing, which was submitted to us by agreement; we might say with propriety that we would not undertake to make any disposition of the case which would in effect amount to a reversal of Judge Edwards' ruling.

We have examined the case, however, as if it was before us *de novo* and we are clearly of the opinion that the law is with the defendant. The real question, and the only one worthy of discussion, is: Does a street railway company, having the right to lay out and construct a railway from one point to another "with one or more tracks" by laying out and building a single track road and operating it as such for a long term of years, exhaust its power and right to lay a double track when the necessities of its business and the traveling public require it? We would serve no good purpose in referring to the cases cited and discussed in the opinion filed refusing the preliminary injunction; (*Boro. vs. Ry. Co.*, 6 Lacka. Jurist, 152), so we will only refer to some additional authority. In the case of *Ransom vs. The Citizens Ry. Co.*, 104 Mo., 375, the identical question was passed upon. In that case the company's rights were based upon a city ordinance and not upon an act of the legislature as in this case, but the principle was the same. The ordinance provided, *inter alia*: "That the right of way of the city of St. Joseph is hereby granted to The Citizens Railway Company for the construction and operation of street railways in the city of St. Joseph, with the power and privileges to said company to construct double tracks, with turnouts or switches at convenient points in the city of St. Joseph." It was held that the construction of a single track and its operation for many years did not exhaust the power of the company to change to a double track when the business demanded it. And in the case of *Workmen vs. So. Pac. R. Co.*, 62 Pac. 185, it was held that when an ordinance permitted the laying of "tracks or track" and the company laid a single track it had the right at any time thereafter to construct another track.

It is argued that even if the defendant had the power to lay a double track a permit should first have been obtained under the provisions of the borough ordinance. A reference to the terms of the ordinance is all that is necessary to refute the argument. It provides that no

person or corporation shall make any opening, ditch, trench or excavation in any street without a written permit from the street commissioner. It is a matter of common knowledge that the laying of a street railway track does not require any "opening, ditch, trench or excavation," and there is no evidence that any such opening was made, so the terms of the ordinance do not cover the matter complained of.

Let a decree nisi be entered in accordance with our findings. Notice to be given and exceptions to be filed in accordance with the equity rules.

In the Court of Quarter Sessions of Luzerne County, No. 420, April Sessions, 1906.

APPEAL FROM SUMMARY CONVICTION.

Commonwealth vs. Snyder.

A father who sends his children to a Polish school, where the only subjects taught in English are reading and arithmetic, all instruction on other subjects being in Polish, is guilty of a violation of the Act of July 11, 1901, P. L. 658.

To meet the requirements of the act, the child must be sent to a school in which orthography, reading, writing, English grammar, geography and arithmetic are taught in English.

Messrs. W. J. Trembath and William Brewster, for Commonwealth.

Mr. Charles A. Shea, for defendant.

Opinion by Ferris, J., May 28, 1906.

The appeal in this case is from a summary conviction of a parent for violation of the compulsory education Act of July 11, 1901, P. L. 658.

The facts are admitted, and are as follows:

1. The defendant resides in Kingston Borough, within two miles of a public school in session, as measured by the nearest traveled road.

2. He has four children between the ages of eight and fourteen years. Prior to September, 1905, these children attended the public schools of the borough, where the eldest received instruction in reading, writing, spelling, arithmetic, geography, grammar and physiology, and the second child in the same branches except geography. What the two younger children were taught does not appear.

3. Subsequent to September, 1905, the defendant sent his four

children to a private Polish school, kept by one Ignaz Simkowski, and in which the only teachers are himself and his son. The latter holds no teacher's certificate, and is a boy between fifteen and sixteen years of age. Ignaz Simkowski teaches only in the Polish language. The only instruction given in English is by the boy on three days in each week. The only English text-books used are a primer and a beginner's arithmetic. The only branches of learning taught in the English language are reading and arithmetic.

The defendant was convicted of a violation of the law in that he did not send his children "to a day school in which the common English branches are taught," as required by section 1 of the Act of 1901. Whether this conviction should be affirmed or not depends upon what construction is to be given to the phrase just quoted as it used in this statute.

In the first place, it may be remarked that in the use of this phrase the legislative intent clearly was to require attendance at a day school in which the common branches of learning are taught in the English language. That is what the words naturally mean; and if there could be any doubt about it, it would seem to be set at rest by the third proviso to the first section of the act, which is as follows: "Provided, that this act shall not apply to any child that has been or is being otherwise instructed in English in the common branches of learning for a like period of time by any legally qualified governess or private teacher in a family."

In the second place, while it is true that reading and arithmetic, taught in English, are common English branches, they are not "the" common English branches. The employment of the definite article means something. It was plainly intended to designate something having a definite meaning in the legislative mind, and supposed to be well known to the public at large. What that meaning was may properly be sought for in other acts of assembly on the all important subject of popular education. This is a part of our general system of legislation relating to common schools. It is, therefore, to be construed *in pari materia* with other statutes on the same subject and having in view the same purpose, viz., the development and perpetuation of an intelligent citizenship. Turning, then, to the Common School Act of

1854, we find what may be regarded as an expression of what the law-making power meant by the words "the common English branches." Section 38 of that act designates the subjects upon which instruction must be given in each school district in common with all the others. In that sense of the word they are "the" common English branches as fixed and determined by the statute law relating to our common school system. Nor, if we assume that the legislators used the word "common" as synonymous with "usual" or "ordinary," are we led to any different conclusion. The best guide as to what they considered the usual or ordinary or everyday branches of learning, is what they themselves required to be universally taught in the common schools throughout the Commonwealth. The branches so designated by the Act of 1854 are orthography, reading, writing, English grammar, geography and arithmetic. Failure to afford instruction in any of these branches was made a ground of forfeiture by the district of its quota of the state appropriation. They are "the common English branches" within the meaning of our statute relating to education, and within the meaning of the Act of 1901. This conclusion is strengthened by the very evident intent of the framers of the compulsory act that the education a child should receive outside the common schools must be at least equivalent to that which the latter were bound by law to furnish.

If the views above expressed are correct, it necessarily follows that the defendant was properly convicted.

The judgment is affirmed, and it is ordered that the sentence imposed by the justice of the peace be carried into effect.

corporation for the cost of a sewer for which it has paid, and which authorizes any person whose premises adjoin, or are on a line with, the sewer, to connect therewith by paying a certain sum into the city treasury, is held, in *Fergus Falls vs. Edison* (Minn.) 70 L. R. A. 238, to include property on a parallel street, which is connected with the sewer through a private lateral which has been laid in a connecting street. A note to this case reviews the other authorities on right and duty to connect property with drain or sewer.

*In the Court of Common Pleas of Potter County, No. 221, June Term,
1905.*

CERTIORARI TO L. B. COLE, JUSTICE OF THE PEACE.

Mericle vs. Van De Boe.

The fact that a party sued in trover before a justice of the peace, where assumpsit was the proper form of action, is no ground for reversal on certiorari, if the justice had jurisdiction of the subject-matter of the litigation.

Messrs. Peck & Peck, for plaintiff.

Messrs. Nelson & Maynard, for defendant.

Opinion by Ormerod, P. J., July 7, 1905.

The exceptions filed in this case by the plaintiff in error are: 1. That the justice had no jurisdiction in an action of trespass in this case. 2. That, under the evidence of the defendant in error, farm was leased and plaintiff in error became a tenant and the relation of landlord and tenant existed; therefore, an action of trespass would not lie. 3. The evidence showed there was no division of the products of the farm, and until their division they were the property of the tenant, and an action in trespass would not lie.

The exceptions are substantially alike and raise the question of jurisdiction of the form of action before the justice.

The transcript of the justice shows that a *capias* in trover and conversion was issued March 16, 1905, to the constable of Coudersport Borough on oath of C. D. Van DeBoe, charging that the defendant, C. M. Mericle, of the Township of Eulalia, County of Potter and State of Pennsylvania, within two years last past, did take and convert to his own use 10 tons of hay, 20 bushels of apples, 100 bushels of potatoes, 40 dozen eggs, 17 bushels of rutabagas, 1000 cabbage heads, 25 hens, 2000 pounds of milk, all of the value of about \$200.

Upon this *capias* the defendant, C. M. Mericle, was arrested and brought before the justice of the peace.

Upon the hearing, which occurred upon a subsequent date, March 25, the testimony of C. D. Van DeBoe, the plaintiff, was taken and appears in the transcript, in which the said C. D. DeBoe swore that he leased his farm in Eulalia Township on shares to the defendant, the proceeds of the farm to be divided, each to have one-half. Hay to be

kept on the farm to feed the cows, and surplus to be divided at end of term, to wit, March 17, 1905. And that the defendant, without division of said products, took them away and sold them and converted them to his own use.

Upon this testimony and the testimony of others, the justice entered judgment against the defendant for \$1111 and costs of suit. This judgment was entered on March 29.

A *capias ad satisfaciendum* was issued, the property of the defendant levied upon on April 18, 1905, and on the same date the defendant was delivered to the keeper of the common jail by the constable. By virtue of the levy made by the constable, he sold the property of the defendant.

We are clearly of the opinion that, under the statement of facts as set forth in the transcript of the justice of the peace, the action was improperly brought in trover and conversion, but the record also shows that the subject-matter of the action, to wit, the breach of contract on the part of the defendant, C. M. Mericle, to deliver one-half of the crops in accordance with the terms thereof, was a subject matter over which the justice of the peace had jurisdiction. And while we are of the opinion that trover would not lie, we are clearly of the opinion that *assumpsit* would.

The justice having jurisdiction of the subject-matter, the question of jurisdiction of the justice of the peace cannot successfully be raised.

The 21st section of the Act of March 20, 1810, provides that no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment was rendered and served within five days thereafter.

The judgment in this case was entered on March 29, 1905, the *præcipe*, affidavit of recognizance for *certiorari* was filed May 1, 1905, thirty-three days after judgment was entered, and therefore taken too late.

And now, July 7, 1905, exceptions overruled and *certiorari* dismissed.

In the Court of Common Pleas of Snyder County, No. 13 December Term, 1905.

RULE TO AMEND RECORD.

Botdorf vs. Shaffer & Bro.

A summons issued against two persons as alleged partners. It was served on one only. Neither appeared. Judgment was entered against both. Held, void as to the defendant not served, and therefore it could not be sustained as to the defendant served.

Mr. A. W. Potter, for plaintiff.

Mr. Charles Hower, for defendant.

Opinion by McClure, P. J., February 1, 1906.

This record has vital defects apparent on its face which no amendment can cure. Let us assume that John Shaffer was a misnomer for Harry G. Shaffer, and that Harry G. Shaffer made purchases from the plaintiff in the name of A. C. Shaffer & Bro., representing that he and A. C. Shatter constituted the partnership.

A. C. Shaffer was not served with the summons, and had no notice that he was being charged by the plaintiff as a partner of Harry G. Shaffer, and in consequence liable for his acts and responsible for the performance of his contracts. In an action against a partnership service upon one partner is not service upon the others, and will not be notice to them save where actions are expressly authorized against a partnership by its firm name only: 15 Ency. of Plead & Prac., 901.

Notwithstanding service was had upon but one, the justice entered judgment against both defendants by default. The judgment is without doubt void as to the defendant not served, for he had no notice to appear, hence could not be in default, and, if void as to one defendant, it cannot, under our authorities, be sustained as to the other: Boaz vs. Heister, 6 S. & R. 18; Donnelly vs. Graham, 77 Pa. 274; Murdy vs. McCutcheon, 95 Pa. 435.

In Donnelly vs. Graham, the summons was issued against four men trading as William Willard & Co. One was not served with the writ, another, Rafferty, although served, neither appeared nor pleaded. Without taking an interlocutory judgment against Rafferty, the plaintiff proceeded to trial and obtained a verdict and judgment against him and the two defendants who had appeared and pleaded. The court said the judgment against Rafferty was incurably bad, and, as the suit was

joint and the claim joint, the plaintiffs must recover against all or none, and the judgment could not be sustained against any of the defendants. The case at bar is more irregular, as judgment was taken by default against one party jointly charged on a joint claim who was never served with the writ.

Murdy vs. McCutcheon is directly in point. There, as here, the justice issued a summons against two persons, which was served on one only. The claim was a joint contract, and, without appearance by either defendant, judgment was entered against both defendants by default. It was held that the judgment could not be affirmed as to one defendant and reversed as to the other, but was bad as to both.

As the proposed amendments would not cure the defects in the record, the rule to amend will be discharged.

And now, to wit, February 1, 1906, rule to amend is discharged, and the judgment of the justice is reversed.

In the Court of Common Pleas of York County, No. 114, August Term, 1905.

CERTIORARI TO JUDGMENT OF ALDERMAN.

Wilson vs. Trout.

The record of a justice of the peace or alderman must set forth sufficient facts to show clearly that the action is trespass vi et armis and not trespass on the case. Since the Act of 1887, consolidating actions of trespass and case, the word "trespass," standing alone on the justice's docket or transcript, is not in itself sufficient to show that the cause of action was within his jurisdiction. The record must also show the time and place of the commission of the trespass complained of, and sufficiently describe the property injured and the nature of the injury to protect the defendant from another suit for the same cause of action.

Mr. W. B. Gemmill, for exceptions.

Mr. R. J. Lewis, contra.

Opinion by Wanner, J., March 21, 1906.

The one substantial objection made to this record is, that it does not affirmatively show on its face that the alderman had jurisdiction of the cause of action.

The summons was issued "in a plea of trespass, founded upon a claim for damages sustained by plaintiff at hands of defendant by reason of injury to and loss of plaintiff's personal property, not exceeding \$300."

Ever since the Act of March 22, 1814, 6 Sm. Laws, 182, giving jurisdiction to justices of the peace in trespass, the court have uniformly held that this meant trespass *vi et armis*, where the injury is direct and immediate, and that they have no jurisdiction of an action of trespass on the case for consequential damages, and the same rule applies to aldermen.

The Act of July 7, 1879, P. L. 194, giving justices of the peace and aldermen concurrent jurisdiction with Courts of Common Pleas of all actions of trespass, wherein the sum demanded does not exceed \$300 (except in real contracts where land titles may come into question and actions on promise of marriage), did not change the rule. The current of decisions to the same effect has been uninterrupted by the passage of that act.

The jurisdiction of the aldermen being limited and defined by statute, must appear from an inspection of the record itself, or his judgment cannot be sustained.

Formerly it was held that where his suit was called an action of "trespass" on his docket, it was presumed to mean trespass *vi et armis*. That being the only form of trespass of which he had jurisdiction, and the law presuming his proceedings to be regular, that seemed a proper intendment. It would have been a violent presumption to draw the opposite inference that he had intentionally exceeded his statutory powers.

But since the Act of 1887, which destroys the distinction between these different forms of procedure, and consolidates both in one general action of trespass, it has been held that the word "trespass" alone on the magistrate's docket does not, in itself, sufficiently indicate the precise form of action, or show that the cause of action is necessarily within the jurisdiction of the justice or alderman: Wood vs. Bronson, 2 District Reps, 746; Bridenbaugh vs. Hetzler, 18 York Legal Record, 154; Fitzgerald vs. Campbell, 10 Pa. C. C. Reps. 396 (1890).

Judged by that rule, this record is fatally defective, as it does not indicate the precise form of the action, or even, by description of the acts complained of, show whether a direct and immediate injury resulting from a tort is meant, or whether plaintiff is merely seeking consequential damages in an action of trespass on the case.

But there are other serious objections to this record. It does not in any way fix the time or place of the commission of the trespass complained of.

So far as the record shows, this action may have been barred by the statute of limitations before it was brought.

The record should also sufficiently describe the property injured and the nature of the injury, so as to protect the defendant from another suit for the same cause of action. It must set forth sufficient facts to show clearly that the action is trespass *vi et armis* and not trespass on the case: *Fitzsimmons vs. Phelan*, 8 District Reps. 651; *Mills vs. Ross*, 16 York Legal Record, 9; *Krout vs. Detweiler*, 3 Pa. Justices' Law Repr. 183; *Hartwig vs. Railroad Co.*, 15 District Reps. 290; *Strasbaugh vs. Dessenger*, 18 York Legal Record, 73; *Ryan vs. Gross*, 19 Lanc. Law Rev. 385; *Fitzgerald vs. Campbell*, 10 Pa. C. C. Reps. 396.

Although the report of an alderman is not to be adjudged too technically and critically, yet these main essentials to show his jurisdiction must be insisted upon.

The exceptions filed by defendant are sustained, the judgment of the justice is reversed and set aside, and judgment is now rendered for the defendant for the costs of said suit and of these proceedings.

Testimony given before a coroner's jury, by one subsequently accused of the crime then under investigation, is held, in *Tuttle vs. People* (Colo.) 70 L. R. A. 33, to be inadmissible at his trial, under a constitutional provision that no person shall be compelled to testify against himself in a criminal case. The other authorities on admissibility, on trial for murder, of testimony of accused at coroner's inquest, are collated in a note to this case.

A physician of a different school is held, in *Grainger vs. Still* (Mo.) 70 L. R. A. 49, to be properly allowed to testify as to the correctness of the diagnosis of a case by an osteopath as dislocation of the hip joint, where the diagnosis of dislocation and of disease of the joint is the same in all schools of medicines; though he is not competent to express an opinion as to the correctness of the treatment given by the osteopath, unless it appears that both schools employ the same treatment in such cases.

In the Court of Common Pleas of Northampton County, No. 14, February Term, 1906.

**MOTION FOR JUDGMENT FOR WANT OF SUFFICIENT
AFFIDAVIT OF DEFENCE.**

Stephenson vs. Dodson.

When a foreign corporation omits to file a statement in the office of the Secretary of the Commonwealth, and suit is brought against the president and secretary to charge them with personal liability upon one of a series of corporate bonds secured by mortgage to a trustee, authorized and issued in this state, and assumed to be forbidden, the action cannot be maintained until by its written terms the bond is due.

When the stockholders and directors of a West Virginia corporation, having its business, plant, office and property in Missouri and its capital invested and employed there, meet at an office which they maintain in Pennsylvania and authorize a loan by the issue of bonds secured by a mortgage on its property in Missouri, this single transaction does not constitute "doing business" within the contemplation of the statute.

Recitals in a bond, immaterial and non-contractual, do not conclude the corporation against denial of them.

Mr. G. R. Booth, for plaintiff.

Messrs. Kirkpatrick & Maxwell, for defendant.

Opinion by Scott, J., April 9, 1906.

This suit is upon a bond, with interest coupons attached, purporting to be issued at Bethlehem, in this county, by the Dodson Lead and Zinc Company, a corporation of West Virginia, signed by Truman M. Dodson, as president, and, attested by Joshua Bachman, Secretary. It is one of a series of 200, each in the sum of \$500, payable "at its office in Bethlehem, Pa., on March 1, 1914." The bonds are secured by a mortgage of the company upon its real estate, machinery, improvements, fixtures and appurtenances, situated in the State of Missouri, where its manufacturing plant is located and its capital employed. Default has been made in the semi-annual payments of interest for more than six months on the bond of which plaintiff is the holder. It is provided therein that upon such default, the principal of the bond shall become "due and collectible upon the request of one or more bondholders holding an amount in the aggregate of \$10,000," made to the trustee named in the mortgage. This notice has not been preferred. The corporation filed no statement in the office of the Secretary of the Commonwealth, pursuant to section 2 of the Act of April 22, 1874, P. L. 108.

The right of present recovery is predicated upon the assertion that

the issue of these bonds at its office in Pennsylvania, without registration, is "doing business" unlawfully in this state, and that an immediate personal liability is thus imposed upon the officials named, as the agents of said corporation, for the unauthorized contract in the name of their principal. For the purposes of this rule, the affidavit of defence must be accepted as verity.

It is averred :

1. That the foreign corporation, of which these defendants are president and secretary respectively, was chartered in West Virginia for the purpose of mining, preparing for market and selling lead, zinc and other minerals in Missouri; that all its property is located there, and none ever in Pennsylvania; that all its business (excepting the issue of these bonds) has been and is transacted in the last above named state; that none of its capital is invested or employed here; that it is lawfully admitted in Missouri, and maintains there the business office of the corporation.

2. That these two defendants, together with some of the directors, are residents of Bethlehem, and secured there desk-room in an office for convenience to hold meetings of the directors, and to keep the stock ledger and other books and papers of the corporation, "all of which was permitted and authorized under the laws of West Virginia."

3. That the property mortgaged to secure the payment of bonds above specified is situated in the State of Missouri; that the money advanced thereon was loaned to and received by the corporation and not by these defendants as individuals or as agents of said company.

I. This suit is upon the bond and not in disaffirmance of the contract for return of the consideration paid. It is so presented by the pleadings and urged by argument, although the second paragraph of the amended statement suggests some previous purpose of rescission. It would be incongruous to maintain an action upon the contract and also to disaffirm; but I need not pause to consider this question, nor whether, if rescinded, there could be a recovery from the defendants for money had and received, when, as the answer alleges, they did not get it: *Lee vs. Gibson*, 14 S. & R. 105; *Paul vs. Grimm*, 165 Pa. 139.

If the corporation had no legal existence in Pennsylvania, and the defendants are liable upon the forbidden contract (*Lasher vs. Stimson*,

145 Pa. 30), it can only be enforced against them according to its written terms. In that event, the company is not exempt, either, for it cannot plead its own default: *Swan vs. Watertown Fire Ins. Co.*, 96 Pa. 37; *Galveston R. R. Co. vs. Cowdrey*, 11 Wall. 459. Service could be made upon any resident agent (*Hagerman vs. Empire Slate Co.*, 97 Pa. 534) or upon any principal officer, according to the modes of service provided by statute in reference to domestic corporations: *Beale, Foreign Corp.*, Sec. 267. But, in either case, the action upon the bond will not lie until it is due. If the defendants here are responsible upon the undertaking, it is upon the contract they unlawfully made and not upon some other plaintiff then might institute suit against either principal or the agents upon the written engagement, or for sufficient reasons rescind and disaffirm and demand the amount paid.

This bond does not become due and collectible until 1914, unless one or more of those whose holdings aggregate \$10,000 shall notify the trustee named in the mortgage which secures their payment to proceed. The case of *Philadelphia & Baltimore Central R. R. vs. Johnson*, 54 Pa. 127, is not authority for a different view. It will be seen in the statement of the facts, and by the suggestion filed of record with copies of the obligations by the owner of the bonds, that they were due by their express terms when the action was brought.

In *Com. vs. Susquehanna & Delaware R. R. Co.*, 122 Pa. 306, the judgment which was pleaded against the suggestion of the Attorney-General was not obtained on the bonds, but for interest due on the coupons.

While recovery upon the bond itself, under the assumption that the corporation was unlawfully prosecuting its business in this state, must be denied, it would be otherwise respecting the overdue interest at the time the action was commenced. This is part of the plaintiff's demand, and copies of the coupons are contained in the statement. That liability is within the rule of *Lasher vs. Stimson*, 145 Pa. 30, and plainly distinguishable from the contention made in *Bond vs. Stoughton* 26 Pa. Superior Ct. 483, seeking to charge directors and stockholders as partners, who had no participation in, nor knowledge of, the forbidden acts of the foreign corporation. The statute itself imposes no

personal penalty upon them for omission of the company to obtain a certificate.

Upon such judgment for interest, the plaintiff would be restricted in execution to property other than that embraced in the general mortgage (*Western Pennsylvania Hospital vs. Library Hall Co.*, 189 Pa. 269), or might file a bill against the trustee to foreclose on behalf of himself and all others in the same class: *Com. vs. Susquehanna & Delaware R. R. Co.*, 122 Pa. 306.

II. Under the averments of defendant's answer, its business office is located in Missouri; its capital all invested and its property situated there. It was not engaged here in the prosecution of its incorporated purpose for mining and selling lead and zinc. These allegations, if established by proof, exclude the fact that the corporation was "doing business" in Pennsylvania. I need not stop for citation of decisions. A copious collection of them will be found in *Beale on Foreign Corp.*, Sec. 204, and notes.

But it is admitted that these bonds to an amount of \$100,000 were issued at Bethlehem, upon which, and the mortgage on property in Missouri to secure their payment, the money was borrowed; that the company has an office in this state where the directors meet, and the stock ledger, the books and papers of the corporation are deposited and kept.

Upon the face of the bond it is recited that the series was issued "in pursuance of the resolutions adopted at a meeting of the stockholders of the said company, duly called, those holding a majority of all the shares of stock issued and outstanding being present and voting therefor, held at the *principal office* of the company at Bethlehem, Pa., * * * and of the action of the board of directors of the same company at a meeting held at the same place."

It is asserted in the answer that the company "has established and maintained an office in said state (of Missouri) for the purpose of transacting the proper business of the said corporation for which it was created and organized." The recital in the bond that the principal office of the company was at Bethlehem was not essential to its validity. To that extent, therefore, it was the recital of a fact immaterial and non-contractual, and the company is not estopped against denial and proof otherwise: 16 *Cyc. Law and Proc.*, 701. It is difficult to understand

how the corporation can maintain an office where directors may meet, and where its books and papers are kept, without exercising its franchise and doing some business relating to the continuous prosecution of mining, manufacturing and selling its products, although the plant be in a distant state. Upon this rule, we can go no further than the averments in the answer. Such disputed matters and the natural inferences from the facts when general business is denied must be settled by a jury; *Liebig Manufacturing Co. vs. Hill*, 7 Pa. Superior Ct. 15. Much more than is admitted here may appear upon the trial. A foreign incorporated company may lawfully do some incidental business in the state, bearing no relation to its corporate purpose, if none of its capital be employed here, and directors may hold meetings not designated for that end: *Kilgore vs. Smith*, 122 Pa. 48; *Pavilion Co. vs. Hamilton*, 15 Pa. Superior Ct. 389.

Under a similar statute in New York, the court of appeals said: "We are not prepared to hold that an occasional business transaction, that keeping an office where meetings of directors are held, transfer books kept, dividends declared and paid and other business merely incidental to the regular business of the corporation, would bring it within the act." *People vs. Horn Silver Mining Co.*, 105 N. Y. 83. It seems, therefore, that a single meeting of the stockholders and another one by the directors, at Bethlehem, to take corporate action respecting a loan to be secured by a mortgage on property in Missouri, is not forbidden. Although it may be inferred, it does not appear as a fact for what purpose the money was applied. Upon this motion, summary judgment against these officials for the company's indebtedness must be withheld.

Now, April 9, 1906. rule discharged.

An insured who accepts a policy incorporating the provisions of another policy as part of the contract is held, in *Conner vs. Fitzgibbons vs. Merchants' & B. Mvt. F. Ins.* 70 L. R. A. 106, to be bound by such provisions, although the policy referred to is in possession of the insurer, and is never seen by the insured, who knows nothing of its terms. The other authorities on effect of party's ignorance of contents of extraneous paper upon an attempt to incorporate it into contract by reference are collated in a note to this case.

In the Court of Common Pleas of Butler County, No. 30, December Term, 1904.

**RULE TO SHOW CAUSE WHY NON-SUIT SHOULD NOT BE
TAKEN OFF.**

Damikus vs. The Standard Steel Car Company.

Plaintiff, who was going to his employer's works, attempted to cross a private track by passing between two cars standing thereon; although he could have reached his destination by a more circuitous route. The cars extended through the open doors of the building, where the force was applied which moved them and caused the injury. He admitted that he did not look to see whether the cars were about to be moved before crossing, but said that had he looked, he could have seen nothing. His statement to this effect was a conclusion or inference rather than a fact, as appeared from the width and height of the doors, their proximity to one another and the size of the car standing therein, together with the fact that there was opportunity to see from within outward. Held, that he had been guilty of contributory negligence and could not recover for injuries sustained by being caught between the cars, which were suddenly moved, in his attempt to pass between them.

Messrs William Z. Murrin and John Murrin, for plaintiff.

Messrs. John B. Greer and Thomas Greer, for defendant.

Opinion by Thomas, P. J., 30th judicial district, specially presiding, December 27, 1905.

There were a number of difficulties in the way of plaintiff's recovery in this case, but, in our opinion, there was such a state of facts shown as would warrant no other conclusion than that plaintiff was guilty of negligence that contributed to the injury complained of, and if such be true, no other feature of the case requires consideration.

It appears that plaintiff was going to the paint house at defendant's works, where the duties of his employment required that he should go; that there was another way by which he might have reached the point (as we recollect the testimony, it not having been transcribed) without incurring the risk of danger, but that he took a more direct course by passing between two cars standing on a track leading into a building; that the cars were standing along said track and extending through the open doors into the building, where the force was applied to them that moved them and caused the injury. It very clearly appears that plaintiff did not look for any danger or to see if the cars were about to be moved. All he observed was the opening and then attempted to pass through the same.

It is maintained that he was not required to look, as it appears that he could not have discovered the danger had he done so. It is true that this was not the case of a traveler about to cross, on a public highway, the tracks of a railroad company, but we apprehend that he owed the duty of looking and listening, at least, and, we believe, of stopping, before entering upon the private tracks of his employer, which he knew were used for the purpose of operating cars, and upon which he then observed cars which were in a position to be moved.

"Where a servant walking across the track is not engaged in work demanding his attention, it is his duty to see and hear approaching trains, because he can give his attention to what is taking place about him. Under these circumstances, it is apprehended that the servant is held to the same measure of care in looking and listening for approaching trains as a traveler. There is certainly no reason why he should not be:" 20 Am. & Eng. Ency. of Law (2d ed.), 145.

It is urged, however, that he was not required to do a vain thing, and the evidence shows he could not have seen the cause of the accident or have avoided the same by having so looked. It is true he said he could not have seen within the building, but it was very clear that the testimony as to that was as to a conclusion and not based upon facts. From the width and height of doors, the proximity of the pairs of doors to each other, and the size of the car standing in the same together with the fact that it appeared that there was room and opportunity to see from within outward, we must conclude that the testimony as to the conclusion that he could not see in, not based on actual facts or similar circumstances, is not sufficient to have excused him from exercising the care legally imposed upon him.

Our attention has been called to cases which, in our opinion, are clearly distinguishable from the one at bar.

The case of *Vanesse vs. Coal Co.*, 159 Pa. 403, arose out of an injury resulting from defective construction of a portion of defendant's works. We do not understand that it is ever the duty of an employee to seek for defective construction in works about which he is employed and which he is not engaged in constructing. Besides, it would seem that there was no evidence showing that plaintiff failed to observe the condition existing, but, on the contrary, the language of the court seems

to imply that he did look but could not see the defect which it was the duty of those constructing the same to detect, and who should have detected the same. The court, Dean, J., says: "If he had needlessly put himself in peril, had he stepped under a visible overhanging mass of coal or slate, liable at any time to fall and crush him, that would have been contributory negligence. But the very point fairly made on this evidence by plaintiff was that this danger was imperceptible to him, while to his employer, whose duty it was to detect it when setting the timbers, it was obvious, or by ordinary care would have become so."

We assume that he must have given it some observation to have demonstrated the fact that the *"danger was imperceptible to him."*

The case of Richter vs. The Pennsylvania Co., 104 Pa. 511, involved solely the Act of April 4, 1868, and the ruling with reference thereto was the only error assigned. From this case it does not appear that plaintiff did not look or listen before going upon the tracks of defendant. For all that appears from the report of the case he did so; at least the question was not raised or decided.

In the case Christman vs. Railroad Co., 141 Pa. 604, the Act of 1868 and the plaintiff's contributory negligence were both involved. But it appears in this case that plaintiff did look and observe the very danger that resulted in his injury. He saw the engine making the "Shift," and had worked there for some time and knew about how long a time would elapse from what he observed until there was any imminent danger. In speaking of plaintiff's knowledge of the danger during the operation of shifting, the court says: "While conveying notice of the danger, it also conveyed notice of the time likely to elapse and the warning customarily given, before the danger became imminent."

All the court holds, in effect, is that having observed the cause of danger, and having a knowledge of the length of time before it would become imminent, it was a question for the jury as to what observation he should make during the interval. But the court nowhere intimates that he might place himself upon defendant's tracks without looking at any time.

Again, the court, Mitchell, J., says: "Under these circumstances, it certainly was not plaintiff's duty, immediately on seeing the engine go up, to cease work and stand idle for the fifteen or twenty minutes

required in the operation of shifting. How long he might prudently continue at work, and what amount of observation he was bound to give to the progress of coupling the cars and approaching his locality, depended on too many elements to enable the court to say there was any fixed standard of prudent conduct to which he was bound to conform. That, under the evidence, was a question for the jury."

We are persuaded that this was a clear case of contributory negligence, and, without considering the other objections to plaintiff's right of recovery, the rule is discharged.

In the Court of Common Pleas of Susquehanna County, No. 136, January Term, 1906.

**RULE UPON PLAINTIFF TO SHOW CAUSE WHY WRIT OF
CAPIAS SHOULD NOT BE SET ASIDE AND
DEFENDANT DISCHARGED FROM THE
LIABILITY UPON HIS BAIL
BOND.**

Cronk vs. Wheaton.

A resident of Deposit, New York, in returning from court held in another part of the State of New York, where he was a party and witness, passed through Pennsylvania, and was there served on the train with a *capias*. Rule to set aside *capias*, discharged.

Messrs. Floyd Axtell and T. J. Davies, for rule.

W. D. B. Ainey and Thomas Doherty, for plaintiff.

Opinion by Searle, P. J., April 9, 1906.

The defendant in this case is a resident of Deposit, State of New York. Upon December 27, 1905, he was in attendance before the Supreme Court of the State of New York, held at Binghamton, Broome County, New York, as a party and witness; same day, as he was returning to his home in Deposit from Binghamton, while on the railroad which runs through Binghamton and Deposit, passing between said points through Susquehanna, he was arrested on a *capias* issued in above entitled case while in said County of Susquehanna and State of Pennsylvania, and gave bail in the sum of \$1000.

It is well settled that parties and witnesses while in attendance upon court are privileged from arrest upon civil process, *cundo, morando et redeundo*, and this rule in Pennsylvania protects parties and witnesses from another state, attending the courts in this state, from service of process, although the attendance was by agreement of parties to take depositions before a notary public: *Partridge vs. Powell*, 180 Pa. 22. Biddle, P. J., in the court below, in an opinion which was affirmed by the Supreme Court, said: "As between the parties, it was a waiver of the necessity of taking out a commission for the benefit of the defendant. While he could not claim the privilege as against a third party, as he was not brought here, nor did he come voluntarily in consequence of any legal process, yet, when the legal process is waived by both parties, neither can take advantage of the waiver. It would be an inducement to bring him within the jurisdiction which should not be taken advantage of; he ought to stand in the same position as if he came under a commission; in which case, we do not think he could be served."

The research of diligent counsel have been unable to find and cite any case in any state in which it has been held that this privilege from arrest or summons on civil process extends beyond protecting the party or witness in attendance upon a court of the state in which the process issued from which the exemption is claimed. In the case of *Holyoke and South Hadley Falls Ice Co. vs. Ambden*, 55 Fed. Repr. 593, 21 Lawyers' Repr. Ann. 319, cited by counsel for plaintiff, it was held that a party or witness is not exempt from service of process in a state through which he is passing to attend court in a different jurisdiction.

District Judge Carpenter, in his opinion, in referring to the privilege of exemption from service of process, said: "In none of them, however, has it been held that a party or witness is exempt from service in any other jurisdiction than that in which his attendance as a party or witness is required. I cannot see any reason for further extending this rule. It is established by courts to protect their own process and suitors by the assurance that the courts in which the party has brought his action, or into which he has been summoned, or into which the witness has been summoned, will not permit its own process or that of other courts in the same jurisdiction, in another action, to embarrass

the proceedings. It seems to me that evils greater than these sought to be remedied would arise if the courts of one state should assume so to guard and protect all the other courts in the country."

In the case at bar, the defendant was voluntarily in the State of Pennsylvania and County of Susquehanna when the process was served. He was not here in response to any process of any court of the State of Pennsylvania or any agreement by the parties in this suit; he came into the state because he found it more convenient in going from his home in Deposit, New York, to Binghamton, in New York, and I can see no reason why the fact that his business at Binghamton, in the State of New York, was to attend the courts of the State of New York should exempt him from service of process in the State of Pennsylvania.

The rule is discharged.

*In the Court of Common Pleas of York County, No. 11, January Term,
1906.*

CASE STATED.

Niles & Neff vs. York County.

County auditors are entitled to legal advice in the performance of their official duties, and the attorney employed by them may recover from the county a reasonable compensation for his services.

Messrs. Niles & Neff, for plaintiffs.

Mr. H. C. Brenneman, for defendant.

Opinion by Wanner, J., March 12, 1906.

According to the admitted facts of the case stated, the plaintiffs were duly employed by the county auditors of York County to act as their legal counsel in the auditing of the county accounts for the years 1904 and 1905.

Their bill for \$400 for services rendered, which is admittedly not excessive, was duly approved by said board of county auditors, and ordered to be paid by the County of York.

Payment of the same has been refused, however, by the county commissioners, and the only question before the court is whether or not the county is liable upon this state of facts.

There is no statutory enactment which authorizes the employment of legal counsel by the county auditors at the expense of the county, and no Supreme Court or Superior Court case has been found which decides the precise question now before the court.

The custom of employing counsel for their assistance by the county auditors, at the expense of the county, has the sanction of long and unquestioned usage in the County of York, but no local judicial decision upon the question has been produced to the court.

There are numerous cases, however, that sustain the liability of the county for services rendered to the public, and for supplies and material necessary to the public service, though not specifically authorized by any statutory enactments. The reasons for that conclusion will be found to be entirely convincing upon an examination of the authorities: *Com. vs. Commissioners of Philadelphia County*, 2 S. & R. 193; *Rosenthal vs. Luzerne County*, 11 Kulp, 183; *Allegheny County vs. Watt*, 3 Pa. 462; *Venango County vs. Durban*, 3 Grant, 66; *Commissioners vs. Hall*, 7 Watts, 290; *Northampton County vs. Steele*, 1 Mon, 582.

We may, therefore, safely conclude that the mere want of express statutory authority to the county auditors to retain counsel at the county's expense is not a sufficient defence to the plaintiff's claim, if it falls within the rule laid down in the above cases, viz., that the services rendered be necessary and exclusively for the public benefit.

Judge Terry, in the very recent case of the Wyoming County Auditors, 14 District Reps. 539, holds the county liable for fees for counsel retained by the county auditors, and among the reasons he assigns is one of great weight, viz.: The necessity of legal counsel to advise the county auditors, who are only laymen, in the discharge of the semi-judicial functions which they are called upon to perform in determining the liability of the county on claims presented against it, and the legality of the expenditures of the public moneys made by the county commissioners.

It is quite obvious that the solicitor to the county commissioners would not be a proper party to advise the auditors in passing upon the commissioners' accounts, and there is no other solicitor in the public service of the county from whom they could ask advice. Hence, the propriety and necessity of getting counsel of their own to safeguard



them in the performance of their official duties, whose services would be enlisted exclusively in the interest of the public at large.

The only apparent difference between the case at bar and the one last cited is that the commissioners of Wyoming County had approved and paid the bill, and the question of the county's liability arose on the audit of their accounts.

But the court in that case held that the auditors, regardless of the sanction of the commissioners, could employ counsel in the discharge of their public work, because they possess by necessary implication all such powers as are requisite to enable them to discharge the official duties devolved upon them: 25 Am. & Eng. Ency. of Law (2d ed.), 364; Endlich on Int. of Statutes, secs. 417 and 418; Graham vs. Schuylkill County, 16 Pa. Superior Ct. 180; Chester County vs. Barber, 97 Pa. Superior Ct. 180; Chester County vs. Barber, 97 Pa. 455.

In the case of Allegheny County vs. Watt, 3 Pa. 462, a coroner was held to have official authority to bind the county to pay for the services of an expert physician, whom he had employed to make a *post mortem* examination.

The county auditors should certainly have as much discretion and authority in the matter of securing necessary professional aid on their official work as a coroner has.

For the same reason that the solicitor to the county commissioners could not advise the auditors who sit in judgment on the commissioners' accounts, the latter should not themselves be entrusted with the choice of counsel for the auditors.

In every view of the case, the employment of the plaintiffs by the county auditors seems to have been proper and duly authorized by law.

We, therefore, enter judgment on the case stated in favor of the plaintiffs and against the defendants for the sum of \$422. 80, with costs of suit.

The limitation of the hours of labor per day by statute and department regulations is held, in United States vs. Moses (C. C. App. 9th C.) 70 L. R. A. 281, not to entitle a laborer who voluntarily exceeds that limit without any contract of extra compensation to recover extra pay therefor from the government.

In the Court of Common Pleas of Venango County, No. 42, November Term, 1905.

**PETITION FOR WRIT OF MANDAMUS ON CITY TO ALLOW
PLAINTIFF EXONERATIONS ON CITY TAXES.**

Lamberton vs. City of Franklin.

Where a paving ordinance of the City of Franklin was so drawn as to leave it in doubt whether the councils intended to proceed under the special Act of May 18, 1871, P. L. 898, amending the charter of the city, or the general Act of May 16, 1891, P. L. 74, the fact that the records of the court showed that a petition had been presented by the city to the court asking for the appointment of viewers to assess the benefits and damages of property owners, as provided by the Act of 1891, is conclusive that the work was done under the later act.

The confirmation of a report of viewers appointed under the Act of May 16, 1891, is an adjudication of the facts therein recited, and has the effect of a judgment of a court of record and cannot be attacked collaterally, unless shown to be absolutely void. A property owner who has paid the city the benefits assessed against him by a jury of view is concluded thereby and cannot subsequently contend that he is entitled to exonerations upon the theory that the paving was done under the special Act of 1871. Benefits assessed against a property owner under the Act of 1891 are conclusively presumed to be only so much as represent the benefit to his property by the public improvement, and he cannot claim exonerations upon the payment of such benefits.

Mr. E. H. Lamberton, for plaintiff.

Mr. Thomas McGough, for defendant.

Opinion by Criswell, J., January 22, 1906.

The petition herein having been presented to the court, an alternative writ of mandamus was awarded, requiring the defendant to fix and allow to the plaintiff certain exonerations on his city taxes on account of the amount paid by him for the paving of Otter street in front of his property, or show cause why the said credits should not be allowed. To this writ the defendant made answer, denying that the plaintiff was entitled to any such exonerations, and averring that the said street was paved under the general Act of May 16, 1891, P. L. 75, and not under the act supplementary to the charter of the defendant city, approved May 18, 1871, P. L. 896.

The case has been argued and submitted to the court on the pleadings, and while the main facts are therein very meagerly recited and averred, it appears and we find that the Act of 1871 provides authority and a method for paving the streets of the city, the cost and expense thereof to be assessed by the city upon the abutting property according to the foot front, and the owners thereof, with the further provision, "That upon the completion of the paving of any street or streets, alley

or alleys in the said city, and upon payment thereof being made in full by the property holders as aforesaid, it shall be the duty of the city council to exonerate from year to year the owner or owners of all properties fronting on the said street or streets, court of courts, alley or alleys so paved from the payment of all road taxes on such property until said property holders shall have been reimbursed for the principal money so expended by them as aforesaid."

Subsequently, the general Act of May 16, 1891, P. L. 75, was passed, and the question presented for determination is whether the paving in question was done under the local Act of 1871 or under the general Act of 1891.

Reference is made in both petition and answer to the fact that ordinances were enacted by the city, attempting to fix and regulate exonerations under the Act of 1871, but these we regard as immaterial, for the reason that if the paving was done under that act, the abutting property owners are entitled to the exonerations indicated in the statute, and no ordinance is necessary for their allowance. The same section of the act which authorizes the paving provides for the exonerations, and there is no authority to pave thereunder, except upon the condition that the exonerations therein provided for shall be allowed, and the amount of taxes levied for street or road purposes. This amount cannot be changed by ordinance any more than the terms of the act of assembly can be changed.

Whether or not it was intended to pave under the Act of 1871 or the general Act of 1891 should have clearly appeared from the terms of the ordinance authorizing it, but this ordinance is not set out in either the petition or answer. At the argument, however, it was agreed by counsel that the court should consider such ordinance as if the same had been set forth in and constituted a part of the record, and a copy thereof was furnished to the court. On this subject, however, the ordinance is not much more satisfactory than the record. The Act of 1871 provides for apportioning the cost of paving to the abutting properties according to the front width thereof. The Act of 1891 provides for assessing the cost and expense of the paving upon the properties benefited thereby to the extent of such benefits, in so far as the same can be ascertained, any deficiency to be paid by the city. The

ordinance follows the provisions of neither of these acts with any excusable degree of accuracy. It provides that the cost of paving the street intersections shall be paid by the city, and that the balance shall be assessed upon abutting properties "according to law," but without indicating which or what law. As it has been uniformly held that non-abutting properties cannot be assessed for benefits arising from a paving under the Act of 1891, and that the cost and expense must be upon abutting properties, the provisions referred to would appear to leave it uncertain and impossible of ascertainment therefrom which act councils were intending to follow, unless the provisions relating to the city paying the cost of paving the street intersections would point to the Act of 1871 as being the one they were intending to follow. But a later section provides that the cost of the improvement shall be paid by the property owners within sixty days after final confirmation of the report of the viewers. This would point to the Act of 1891 as that under which they were proceeding, as it provides for the appointment of viewers by the court to ascertain and report upon the amount of damages and benefits and for a final confirmation of their report, while the Act of 1871 makes no provision for the appointment of viewers or any confirmation, final or otherwise, of a report by viewers in order to adjust and fix the liability of property owners for the cost of paving, but provides that the cost and expense thereof shall be assessed by the city authorities upon abutting properties according to frontage, no viewers or application to the court being necessary or provided for. While councils may use viewers to aid in securing the facts, the statute makes no provision for so doing.

Neither by the pleadings nor at the argument, however, was any question raised as to the right of councils to pave or as to the regularity or legality of the proceedings for so doing. If both acts remain in force, councils undoubtedly could elect under which it would proceed, and if to this point there was any uncertainty as to the act which they were following or attempting to follow, such uncertainty disappears with the next step taken. This was the presentation of a petition by the city to the court, asking for the appointment of viewers to assess and determine the benefits and damages of the property owners as provided by the Act of 1891. Such viewers were appointed and made



report. Of this report, Mr. Lamberton, the petitioner herein, had due notice and filed exceptions thereto, which were subsequently withdrawn when the report was confirmed absolutely, and Mr. Lamberton paid to the city the amount thus adjudged to be due by him. The confirmation of this report was an adjudication upon the facts therein recited, and has the effect of a judgment of this court which cannot be attacked collaterally, unless it be shown to be absolutely void. The amount thereby adjudged to be due by Mr. Lamberton to the city was not his *pro rata* share of the entire cost of the construction of the pavement, taking into consideration any damage occasioned thereby. By acquiescing therein and assenting to such method of determining his liability to the city, he presumably paid less than if his liability had been fixed by the city council under the front foot rule provided by the Act of 1871. He paid for nothing but what he received, and has, therefore, no equity to demand exonerations or reimbursement. At least, this is the theory that underlies the provisions of the Act of 1891, by which his liability was ascertained.

The fact that other streets have been paved under the Act of 1871, and that abutting owners thereon are entitled to exonerations to the extent of their road tax each year until they are reimbursed the principal amounts paid by them for paving, while under the Act of 1891 abutting owners are not entitled to such exonerations, may appear inequitable and may be so, but whether so or not cannot be ascertained without a consideration of the attending and surrounding facts and circumstances. If, however, the law provides for these two methods of paving, the city council, and not the court, has the responsibility of determining which shall be employed, and its judgment and discretion in reference thereto cannot be controlled or reversed by the courts upon the facts as now presented.

We conclude, therefore, that it is settled and determined by the records of this court that the paving in question was done under the Act of 1891, and that the amount paid by Mr. Lamberton on account thereof was the amount only which his property was benefited thereby, and that upon this he is not entitled to exonerations under the Act of 1871.

Other questions were raised and commented on by counsel at the

argument, but a consideration of them by the court on this connection is not deemed necessary to a disposition of the question presented by the record.

In our ascertainment of the facts, our findings may be regarded as liberal, in view of the averments of the pleadings, but we have not gone outside of those referred to and commented upon by counsel and known to the parties in interest.

And now, January 22, 1906, a peremptory mandamus is refused and the proceedings are dismissed, at the cost of the petitioner.

In the Court of Common Pleas of Lycoming County, No. 95, June Term, 1906.

**RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT
ISSUE, ETC**

Yaggi vs. Gahan.

The Act of June 24, 1885, P. L. 159, which makes it the duty of the alderman or justice to demand and receive from the appellant all costs when the appeal is taken, has not been repealed by the Act of April 19, 1901, P. L. 84.

The language of the Act of 1901, that "defendant shall be required to pay only the costs of the appeal," must be construed as meaning that defendant need pay none of the costs which the plaintiff has already paid to the justice.

Mr. J. Fred. Katzenmaier, for petitioner.

Mr. T. F. Gahan, p. p.

Opinion by Hart, P. J., April 23, 1906.

This is a rule to show cause why mandamus should not issue, commanding T. F. Gahan, an alderman, to allow an appeal from a judgment entered in a civil suit by said alderman, in which the petitioner for the mandamus is the defendant. The petitioner, defendant in the judgment, has tendered to the alderman the sum of \$1.25 to cover the costs of appeal, and has offered sufficient bail absolute for the payment of debt, interest and costs, on affirmance of the judgment, and has refused to pay any of the other costs which have accrued before said alderman, and for this reason the alderman has refused to allow the appeal.

The Act of June 24, 1885, P. L. 159, made it the duty of the alderman to demand and receive from the appellant all the costs in such cases when the appeal is taken: *Carbaugh vs. Sanders*, 13 Pa. Superior Ct. 361.

The Act of July 15, 1897, P. L. 300, made it the duty of the alderman, "upon an appeal being taken by the defendant, to return to the plaintiff all costs paid by him."

The purpose of this act is plain and unequivocal. Its whole purpose is to restore to the plaintiff the costs which had been paid by him in the case up to the time of the appeal, and has reference to nothing else, and in no way whatever, either directly or indirectly, affects the Act of June 24, 1885, imposing the duty upon the alderman to demand and receive all the costs from the appellant.

Then comes the Act of April 19, 1901, P. L. 84, entitled "An act to amend the Act of July 15, 1897, etc.," and which provides that "upon an appeal being taken by the defendant in any case to return to the plaintiff therein all costs paid by him, unless such defendant shall give and enter good and sufficient bail absolute for payment of debt, interest and costs, on affirmance of the judgment, in which case the defendant shall be required to pay only the costs of the appeal, and the payment or return to the plaintiff therein of all costs paid by him shall await the final determination of the suit, and if the judgment be affirmed, the same shall be paid by the defendant or the surety to the plaintiff."

It is now contended that this Act of April 19, 1901, repeals the Act of June 24, 1885, so far as it relates to the defendant, which requires the appellant, whether plaintiff or defendant, to pay all the costs.

If this contention be correct, we would then have the anomaly of the plaintiff being required to pay all costs when he takes an appeal, and the defendant only being required to pay the costs of the appeal when he takes the appeal and gives the bail required. In other words, the Act of June 24, 1885, is repealed by the Act of April 19, 1901, so far as it relates to the defendant when he is the appellant, but is not repealed, so far as it relates to the plaintiff, when he becomes the appellant. This would not seem just. It would be a discrimination against a plaintiff, whose right to an appeal should not be rendered any more difficult or burdensome than that of a defendant, and no such interpre-

tation should be given to the Act of April 19, 1901, unless such intention is plainly written therein, and can receive no other rational interpretation.

The plainly expressed purpose of the original Act of 1897 was to afford a means by which a plaintiff, who had advanced the costs or any part thereof, might receive them back from the alderman without awaiting the final determination of the case on appeal, which, without this remedial act, he would be compelled to do. This was the whole and sole purpose of the act. The Act of 1901 sought to amend this Act of 1897, and to so far change its provisions as to deprive the plaintiff of the right to receive his costs from the alderman on the appeal being taken when the defendant had given bail, and provides "that the payment and return to the plaintiff of all costs paid by him shall await the final determination of the suit." This is germane to the act sought to be amended, and is not inconsistent with the plain purpose of the Act of 1885, or, in other words, that this clause repeals by implication the Act of 1885, so far as the same relates to a defendant taking an appeal.

Section 3, Art. 3, of the Constitution provides "that no bill shall be passed * * * containing more than one subject, which shall be clearly expressed in its title."

The one clearly defined subject of the Act of 1901 is the return to the plaintiff of the costs which had been paid by him. The original Act of 1897 had no other object in view. This was the sole subject of that act. It made no provision for the payment of the costs of appeal. Its object was foreign to that subject. Its whole purpose was to impose a duty upon the alderman to pay over to the plaintiff the costs standing to his credit, which had been paid by him to the alderman before the appeal had been taken.

When we consider the words incorporated into this amendment—"in which case the defendant shall be required to pay only the costs of the appeal"—and give thereto the force and effect claimed therefor, we have an entirely new and different subject presented, a subject which goes to the question of the payment of costs by the appellant in order to entitle him to an appeal, and repealing by implication the Act of Assembly of 1885, an act relating to an entirely different subject than that of the Act of 1897.

Independent of this, however, "it is to be remembered that repeals by implication are not favored. To warrant such construction there must be a manifest and total repugnance between the provisions of the old law and the new, sufficient to lead to the conclusion that the new was intended to abrogate the old. * * * The more natural if not necessary inference in all such cases is that the legislature intended the new law to be auxiliary to and in aid of the purpose of the old:" *Com. vs. Vetterlein*, 21 Pa. Superior Ct. 587.

In *Johnson vs. Lipp*, 13 District Reps. 755, Butler, J., in construing the Act of 1901, says: "The language, 'in which case the defendant shall be required to pay only the costs of the appeal,' must be construed as meaning that in such case the defendant need pay none of the costs which the plaintiff has already paid to the justice. This is clear from the context and from the general tenor and scope of the Act of 1897 and its amendment of 1901. Immediately following the words 'in which case the defendant shall be required to pay only the costs of the appeal' is the language, and the payment or return to the plaintiff therein of all costs paid by him shall await the final determination of the suit. It thus appears that the only effect contemplated by the amendment was to enable the defendant to require the plaintiff to await the final determination of the suit for a return of costs paid by him."

This interpretation confines the Act of 1901 within its legitimate scope—the one subject of the Act of 1897—avoids the discrimination between plaintiffs and defendants, desiring to take appeals, which would result from the partial repeal of the Act of 1885 claimed, and would make the act auxiliary to and in aid of the Act of 1897, which it seeks to amend.

This interpretation seems to us fully justified by the well settled rules of the interpretation of statutes to which we have referred.

And now, April 23, 1906, rule discharged.

In the Court of Common Pleas of Luzerne County, No. 334, January Term, 1904.

**RULE TO SHOW CAUSE WHY JUDGMENT SHOULD NOT
BE MARKED SATISFIED AS TO \$192.02.**

Keilholz vs. Keilholz.

The Court of Common Pleas is without power to require the plaintiff to satisfy a judgment *pro tanto* which has been partially paid.

Mr. John McGahren, for rule.

Mr. S. J. Strauss, contra.

Opinion by Ferris, J., August 7, 1905.

The judgment in this case is for \$200, with interest from December 28, 1903. No claim is made that it has been fully paid; but it is alleged by the defendant that he has paid \$192.02 of the debt which it represents, and he now asks that the plaintiff be required to satisfy it *pro tanto*. We know of no authority in the court to make such an order. The Act of March 14, 1876, P. L. 7, empowering the court to order the satisfaction of judgments, is confined to cases where it clearly appears that the debt has been fully paid; for it grants a summary power in derogation of the common law and in denial of the right of trial by jury, and must, therefore, be strictly construed. Nothing less than a complete payment in full of the debt and costs would authorize a decree under that act: *Felt vs. Cook*, 95 Pa. 247; *Melan vs. Smith*, 134 Pa. 649; *Atkinson vs. Harrison*, 153 Pa. 472; *Shaler vs. Parsons*, 1 Pa. Superior Ct. 281; *Anderson vs. Best*, 176 Pa. 498. Whether the courts ought to have the power to direct that partial payments of judgment debts be entered of record is a question upon each side of which something might be said. But as yet it is a legislative, not a judicial question. Perhaps that power should be conferred. The fact remains that it has not been. The rule is discharged.

In the Court of Quarter Sessions of York County, No 54, 1906.

MOTION TO QUASH BILL OF INDICTMENT.

Commonwealth vs. Shoemaker.

An indictment under the Act of March 31, 1860, Sec. 111, P. L. 382, for obtaining property under false pretenses, must distinctly charge that the property in question was obtained by the false pretences set out in the indictment; nothing must be left to inference.

Mr. R. P. Sherwood, for motion.

Messrs James G. Glessner and McClean Stock, contra.

Opinion by Bittinger, P. J., June 22, 1906.

The indictment was as follows: "The grand inquest of the Commonwealth of Pennsylvania, inquiring for the County of York, upon their respective oaths and affirmations, do present that George G. Shoemaker, late of the said county, peoman, on June 20, 1905, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully and wilfully devising and intending to cheat and defraud one John Sweigert of his goods and chattels, moneys and properties, unlawfully did then and there falsely and designedly represent to the said John Sweigert that he, the said George G. Shoemaker, and his brother were the owners of a large livery stable at Norfolk, Virginia, when, in truth and in fact, he and his brother were not the owners of a livery stable in the City of Norfolk, Virginia, and the said George G. Shoemaker then and there, well knowing the said pretences and representations to be false and fraudulent, did falsely, fraudulently and wilfully induce the said John Sweigert to sell and deliver to him, the said George G. Shoemaker, a horse, the property of the said John Sweigert, and accepted his, the said George G. Shoemaker's, certain note for \$65 in payment of said horse, with intent to cheat and defraud the said John Sweigert, to the great damage of the said John Sweigert, contrary to the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania."

The reasons filed are as follows:

I. Because the indictment fails to allege that the indictment which caused the prosecutor to part with possession of his property was the false pretences set out in said indictment.

2. Because there is no allegation in said indictment that "by color and means of the false pretences" therein set forth, the prosecutor parted with the possession of his property.

3. Because the indictment as drawn does not set forth an indictable offence.

It is well settled that in indictment for false pretence there must be charged the obtaining of property by false and fraudulent pretences. The false pretences must be set out and a *scienter* should be charged.

The Act of Assembly of the criminal code of March 31, 1860, Sec. 111, P. L. 382, is in part as follows: "If any person shall by any false pretence obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money or valuable security, with intent to cheat and defraud any person of the same, very such offender shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine not exceeding \$500 and undergo an imprisonment not exceeding three years."

This indictment sets out the false pretence, but does not charge that the defendant, by said false pretences, obtained the horse named in the indictment from the prosecutor with intent to cheat and defraud him, but, after alleging the falsity of the said pretences and the *scienter*, contains the charge that the defendant, George G. Shoemaker, "did falsely, fraudulently and wilfully induce the said John Sweigert to sell and deliver to said George G. Shoemaker a horse, the property of the said John Sweigert, and accept his, the said George G. Shoemaker's, certain note for \$65 in payment of said horse, with intent to cheat and defraud the said John Sweigert."

It is not charged that the said property was obtained by false pretence in the indictment described. The inference is that he obtained the horse fraudulently from the prosecutor by said false pretences, but a crime may not be charged by inference. The accused has a right to know specifically with what he is charged and what he must prepare to defend against, and also so as to be secure against a second prosecution: He has a right to be able to plead his acquittal or conviction as a bar to any further prosecution. Hence, the indictment, to be valid in law, must be sufficiently certain to that end; furthermore, an indictment, while it may be substantially in the language and terms of the act of

assembly prohibiting the crime, and prescribing the punishment in false pretence prosecutions, the false pretences must be set out, and it must be charged that the property described was obtained by false and fraudulent pretences and representations.

This bill of indictment is, in the light of the act of assembly applicable and the decisions of the courts, fatally defective in failing to charge that the horse charged to have been fraudulently purchased by the defendant from the prosecutor was obtained by the false pretences set out in said indictment.

It must, therefore, be held insufficient in law.

The indictment is quashed, and leave is granted to the district attorney to send another bill before the grand jury at August Sessions next.

In the Court of Common Pleas of Union County, No. 76, September Term, 1904.

RULE TO STRIKE OFF APPEAL.

Frederick vs. Leshner.

While payment of costs may be a condition precedent to the right to appeal from the judgment of a justice, it is not necessary that the record show that payment was made.

Where a defective recognizance has been filed by appellant, the proper practice is to apply for a rule on him to perfect his appeal within a given time, and in default thereof to have his appeal dismissed. A rule to strike off the appeal will not be sustained.

Messrs. Glover & Glover, for plaintiff.

Mr. Albert W. Johnson, for defendant, appellant.

Opinion by McClure, P. J., March 12, 1906.

We decided in *Beistle vs. Bingaman*, 22 Pa. C. C. Reps. 158, to go along with the current of authority, and held that, under the Act of 1885, payment of costs is a condition precedent to the right of appeal, but we do not think it at all necessary that the record should show payment had been made. Here we have the statement of the justice that payment was made the day the appeal was taken, and the fact does not seem to be questioned.

The recognizance is defective, but the remedy, is not to summarily quash the appeal. The proper practice is to apply for a rule upon the

appellant to perfect his appeal within a given time, or in default thereof to have his appeal dismissed: *Mearns vs. Trout*, 16 S. & R. 349; *Kerr vs. Martin*, 122 Pa. 436. Here there was an attempted compliance with the law, and the justice's blunder in taking the recognizance should be relieved against. We will treat this as a rule to perfect the appeal and make an appropriate order.

And now, to wit, March 12, 1906, the defendant is ordered to perfect his bail before the justice within twenty days from this date, and in default thereof the appeal will be dismissed.

In the Court of Common Pleas of Dauphin County, No. 131, March Term, 1905.

DEMURRER TO PLAINTIFF'S STATEMENT.

Poltrowitz vs. Lucknow Iron and Steel Co.

Where an action is based upon a foreign judgment, and it appears from the exemplification of the record filed with the statement that there was no personal service on the defendant, and the want of jurisdiction in the foreign court is set up in the affidavit of defence, the defendant may subsequently raise the same point by demurrer and have the case finally disposed of.

Mr. John E. Fox, for plaintiff.

Messrs. Wolfe & Bailey, for defendant.

Opinion by Capp, J., February 9, 1906.

This action was brought by the plaintiff to recover of and from the defendant the balance due on a judgment obtained in the Supreme Court of the County of New York, in the State of New York, entered for the sum of \$547. 94.

From an examination of the exemplification of the record of the judgment, filed with the statement in this suit by the plaintiff, it appears that a warrant of attachment was awarded on August 11, 1903, in the Supreme Court of New York, at the instance of the plaintiff, on the ground that the defendant was a foreign corporation, existing and organized under the laws of the Commonwealth of Pennsylvania, located and having its principal office of business in the City of Harrisburg, and on the following day the sheriff of said county made a levy upon cer-

tain personal property belonging to the defendant within the jurisdiction of said court, on which the plaintiff realized the sum of \$9.68 over and above costs, which amount was credited on the judgment.

The defendant had no office or place of business in the State of New York, and no office or agent upon whom service could be made. No service was made upon it within the State of New York, and it never appeared, answered or pleaded to the action in said court.

"No sovereignty can extend its process beyond its own territorial limits or subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity and incapable of binding such person or property in other tribunals:" Story on Conflict of Laws, ch. 14, Sec. 539.

"Where the state has no authority over the person of the defendant, the judgments rendered by its judicial tribunals, although conformable to its legislative enactments, can have no extra-territorial operation:" Rogers vs. Burns, 27 Pa. 525.

It plainly appears that the suit in the Supreme Court of New York was similar to our proceedings in foreign attachment, without service within the state or appearance by the defendant; and as "courts of one state cannot by process in another state acquire jurisdiction to render a personal judgment against a non-resident defendant so served, unless he makes a voluntary appearance to the action" (19 Ency. of Pl. & Pr., 611), the service by publication or outside the state could not give the court jurisdiction to render a judgment *in personam* or to bind anything except the property levied upon within the jurisdiction of the court.

"Terms are sometimes definitions, and when we say an attachment is a proceeding *in rem*, we mean that it is not a proceeding against the person:" Wilson vs. Mechanics' Savings Bank, 45 Pa. 488.

The defendant, on February 27, 1905, filed an affidavit of defence, in which, *inter alia*, are set forth the foregoing facts, and averred "that the courts of the State of New York had no jurisdiction over the defendant company, except as to any property it might have within the state, nor any power to bind the defendant by a personal judgment, and that the said judgment is void and of no effect outside the State of New York," and on March 9 filed a demurrer (setting forth in substance the above recited facts), averring that the statement is not sufficient in law to maintain the plaintiff's action, because the said judgment

—for want of jurisdiction—was wholly void and of no effect outside of New York.

We asked to overrule the demurrer for the reason that it was filed subsequent to the affidavit of defence, and because it had been held that after an affidavit of defence has been filed it is not proper practice to file a demurrer to a plaintiff's statement. The affidavit of defence in this case is in the nature of a demurrer to the plaintiff's statement: *Byrne vs. Hayden*, 124 Pa. 170.

The same question is raised by both, and as the question is one of law to be determined by an inspection of the record—the jurisdiction of the court—it seems to us that to overrule the demurrer only because it was filed subsequent to the affidavit of defence, when the plaintiff's statement sets forth no cause of action, and thus relegate the parties to a trial by jury, on which trial we would be compelled to sustain a motion for a compulsory non-suit, would be worse than useless. Courts are not required to do vain things. The jurisdiction of the court can be taken advantage of at any time, even though not raised by formal demurrer: *North Shore R. R. Co. vs. Railway Co.*, 193 Pa. 641; and as we are of the opinion that the Supreme Court of New York did not have jurisdiction to render a judgment *in personam* and the proceeding is one *in rem*, the judgment is a nullity and no action can be sustained on it in this court. We are of opinion that it is our duty to sustain the demurrer, and therefore judgment is entered on the demurrer in favor of the defendant.

*IN the Court of Common Pleas No. 2 of Allegheny County, No. 230.
July Term, 1906.*

DEMURRER TO RETURN TO ALTERNATIVE MANDAMUS.

Commonwealth ex rel. Kirschler vs. Brown.

Under Art. ix, sec. 7, of the Constitution, a city may not appropriate money for the relief of residents of a city of another state which has been devastated by fire and earthquake.

Messrs. Elliott Rodgers, City Solicitor, and Lee C. Beatty, Assistant City Solicitor, for plaintiff and demurrant.

Mr. Craig Smith, for defendant, opposed.

Opinion by Shafer, J., May 12, 1906.

The petition is by the mayor of the City of Allegheny, alleging that on April 18, 1906, the City of San Francisco was greatly injured

by earthquake and fire; that on April 19 a resolution was entered in the common council of the City of Allegheny and adopted unanimously by the members who were present and was messaged to select council and adopted unanimously by the members of select council who were present on April 20, and was approved by the mayor on April 21, to the effect that the city comptroller should issue a warrant for \$2500 in favor of the mayor of the City of San Francisco, for the benefit of the sufferers from the earthquake and fire; and that the people of the City of San Francisco are large consumers of the manufactured products made by the citizens of the City of Allegheny; and that there is a large trade and commerce between the inhabitants of the said cities; and that the controller has refused to issue a warrant in accordance with the ordinance or resolution, alleging that the same was contrary to the provisions of the Constitution. The issue of a writ was waived by the controller, and he made a return in which he neither admits nor denies the alleged relations between the cities, admits the passage of the resolution, but declares that the same is opposed to the provisions of the Constitution of Pennsylvania, Art. 9, Sec. 7, and, further, that the resolution was passed by councils in violation of the provisions of Art. 15, Sec. 4, of the Act of March 7, 1901, P. L. 20, which prohibits the final passage of a resolution or ordinance on the same day it is presented, except in cases of public emergency, and only when requested by the city recorder (Mayor) and approved by the affirmative votes of all the members of council. To this return the relator demurred.

As to the power of a city to make such an appropriation, we are referred to the case of *Com. vs. Pittsburg*, 183 Pa. 202, where it was held that the city might appropriate money to defray the expenses of surveys for a ship canal from the City of Pittsburg. We are of opinion, however, that the cases are not analogous, and that the appropriation of money by the city to examine into the feasibility of a proposed highway to be made to and into the city, is far different from an appropriation to relieve the present distress of individual citizens of a distant city. It seems to us that if the City of Allegheny may appropriate money to relieve the citizens of San Francisco who have been injured by earthquake or fire, much more would it be justified in making similar appropriations to its own citizens who may suffer by fire or other calamities, and this, certainly no one would claim to be within the power of the city.

We deem it unnecessary to discuss the question raised by the passage of the resolution on the same day in which it was introduced, though, so far as appears, a request by the city recorder, or mayor, and though a vote of all the members elected to the council.

The demurrer is overruled, and it is ordered that judgment be entered for the defendant, with costs.

In the Orphans' Court of Lancaster County, No. 50, April Term, 1903.
**RULE TO SHOW CAUSE WHY \$600 SHOULD NOT BE PAID
PROPONENT UNDER THE WILL OF TESTATOR.**

Gerber's Estate.

A testator devised a farm in fee in such a manner as would of itself give an immediate estate, but further provided in his will that the widow should be paid an annuity during her life, and that "of what comes into their hands from time to time out of all of the farms, they (the executors) shall loan out on real estate securities until the day of the final distribution of my estate."

Held, that the testator intended his executors to hold the farms and the money legacies bequeathed with them in their hands in trust until after the death of the widow, and the same should not be turned over prior thereto.

Messrs. Harnish & Harnish, for rule.

Mr. Simon P. Eby, for estate.

Opinion by Smith, P. J., December 14, 1905.

This rule, which was heard on petition and answer, is to show cause why \$600 should not be paid Samuel G. Erb under the will of the testator. If the specific devise to the petitioner could be considered independent of any other conditions in the will, our task would not be difficult. It is as follows:

"Item. I give, devise and bequeath unto my grandson, Samuel Erb, the farm of One Hundred and Sixty acres and improvements, situate in Marion County, State of Kansas, now farmed by William Hoover, being the Northeast $\frac{1}{4}$ section No. 35, Township No. 21, Range 2, east of 6 principal Meridian, and as this farm has no buildings on, an if I should die before I have any erected thereon, I order that my Executors shall have a house and barn built, at a cost not to exceed Six hundred dollars, then this farm will be equal in value of the other two farms."

This apparently gives an immediate estate in fee, and this idea is strengthened by the position of the "item"—it being the last, as far as the disposition of its subject-matter is concerned. It can be qualified only by the testator's intentions as gathered from the whole will.

While there are no technical words creating a trust, nevertheless, in a crude way, the testator constituted his executors the trustees of substantially his entire estate, to be held by them for certain uses and purposes during the life of his widow, and until his youngest grandchild shall have attained the age of twenty-two years. Of course, the estate may not, contrary to the Act of April 18, 1853, P. L. 503, be accumulated after the youngest grandchild has attained the age of twenty-one years.

The first object of the testator's bounty is his wife. He orders his executors to pay her annually \$400 as long as she lives and remains his widow. He next directs as follows:

"I order and direct that my hereinafter named Executors, as soon as conveniently can be done after my decease, to sell all my farming implements, grain, tobacco and live-stock, and such of my household and kitchen furniture, not selected by my wife and they shall rent the farm on which John M. Erb, resides at this time to some good farmer, they shall apply so much of the proceeds realized as is needed to pay my just debts, and what is left of what comes into their hands from time to time, out of the farm formerly occupied by John M. Erb, and all the Kansas farms, and my stock dividends, they shall loan out on real estate securities until the day of the final distribution of my estate."

From this it would appear as if he expected the proceeds of the sale of farming implements, grain, tobacco, live stock, etc., to more than pay his debts. The fact is that he left debts amounting to \$11,000, which have been reduced by careful management to \$3473.

"Of what comes into their hands from time to time out of * * * all the Kansas farms * * * they shall loan out on real estate securities until the day of the final distribution of my estate," might not in itself postpone the enjoyment of these farms by the devisees, but, taken with the other parts of the will, it indicates an intention to include them in the trust. If the evidently intended word then had not been omitted, the testator's meaning would have been clearer—then "I give, devise and bequeath unto my grandson, Samuel Erb, the farm of One hundred and Sixty acres."

By the will the trustees are enjoined, among other things, to make periodical payments. If the prayer of the petitioner is granted, to be consistent, a like order must follow if Jacob Erb, another grandson, asks for the \$2000 bequeath to him:

"I give, devise and bequeath unto my grandson Jacob Erb, the farm of eighty acres, now farmed by John Thomas, it being the west half of Northwest, $\frac{1}{4}$ section No. 12, Township No. 21, Range No. 2, and as this farm is the smallest, in order that my grandson Jacob shall stand equal with the rest, of his brothers I order and direct my Executors to pay him out of my estate, in addition two thousand dollars."

The reduction of the principal by these amounts might make it impossible for the trustees to carry out the purposes of the trust.

The grandsons to whom the testator devised Kansas farms either took them in fee immediately upon his death, or they are subject to the trust conditions. We understand the testator's intention to be that they are not to pass to the devisees until after the death of the widow and after the youngest grandchild has attained the age of twenty-two.

Important as it may be to the petitioner, and much as those interested may approved of it, we are nevertheless, constrained to deny his prayer.

The rule is discharged, at the cost of the petitioner.

In the Court of Common Pleas of McKean County, No. 7, October
CASE STATED.

Term, 1904.

Whenever the coroner has reason to suspect that a death was due to other than natural causes, and there are grounds for suspicion that some one is criminally responsible, it becomes his duty to act, and he is the only judge of the necessity of the inquest.

The autopsy is ancillary to the purpose of the inquest, and if the coroner has authority to hold the inquest, it follows that he has authority to employ a physician to perform the autopsy at the expense of the county.

Walker vs. McKean County.

Mr. M. L. Willis, for plaintiff.

Mr. T. F. Richond, for defendant.

Opinion by Bouton, P. J., November 17, 1905.

The facts agreed upon in the case stated for the decision of the court are as follows:

"That on or about November 17, 1903, one John Hinchey, a young boy aged about eight years, was run over and killed by a trolley car owned and operated by the Bradford Electric Railway Company, as it was passing along School street in the City of Bradford.

"That the said Hinchey ran across the tracks of the said railway company in front of the car in such proximity to the car as it was impossible to stop the said car in order to avoid the accident.

"That the said car was being operated in a proper manner and at a proper rate of speed, but without a fender.

"That the accident occurred between the hours of 11 and 12 o'clock a. m., on the said November 17, 1903.

"That B. H. Hall, coroner of the said county, investigated the cause of the death of the said Hinchey, and on November 18, 1903, held an inquest on the body of the said Hinchey, and the jury, after investigating the case, rendered the following verdict: 'That the said John Leonard Hinchey came to his death on November 17, 1903, between the hours of 11 and 12 o'clock, in the city of Bradford, County of McKean, State of Pennsylvania, by being caught by trolley car No. 31, owned and operated by the Bradford Electric Street Railway Company; had said car been properly equipped with fender the death of child would probably have been averted.'

"That the said coroner employed the plaintiff in his professional capacity as physician and surgeon to hold an autopsy upon the body of the said Hinchey, which the said plaintiff, in pursuance of said employment, did, on November 17, 1903, hold an autopsy upon the body of the said Hinchey, and on November 18, 1903, appeared before the coroner's jury and gave testimony regarding the death of the said Hinchey.

"That the said plaintiff rendered a bill to the said County of McKean for \$35, being for professional services in holding said autopsy, which bill the said defendant refused to pay; that thereupon the said plaintiff brought suit before an alderman of the City of Bradford against the said county for said bill, and on May 19, 1904, obtained judgment against the said county for the said sum of \$35 for professional services, from which judgment defendant appealed to this court."

It is admitted that the said sum of \$35 is a just and reasonable charge for the services so rendered.

The office of coroner is of ancient origin. Much of his authority in England he derived from the common law, and the Acts of Parliament which afterward defined more particularly his authority became a part of the law of this Commonwealth. He originally acted as a committing magistrate, but that power he does not have in Pennsylvania. Yet he retains his common law powers wherever they have not been curtailed or taken from him by statute. He is a judicial officer, and the holding of an inquest is a judicial inquiry.

It is the duty of a coroner to hold an inquest *supervisum corporis* when he has cause to suspect the deceased was feloniously destroyed, or when his death was caused by violence or other undue means, but he cannot hold an inquest in every case of death.

If death results from natural causes, as by a stroke of lightning, a fit of epilepsy, apoplexy or a fall occasioned by drunkenness, or where death results from pure accident, as by the kick of a horse, or any accident where there is no reason to suspect that human agency other than that of the deceased contributed to the death, there should be no inquest.

Whenever the coroner holds an inquest the presumption is that he acted in good faith and on sufficient cause: County of Lancaster vs. Mishler, 100 Pa. 624. This presumption is by no means conclusive, but may be rebutted by evidence, but, until so rebutted, it must remain. The purpose of an inquest are, first, to ascertain the cause of death; second, whether or not any one is criminally responsible for the death; third, if any one is criminally responsible, to procure evidence in order that the person responsible may be brought to justice. Whenever the coroner has reason to suspect that a death was due to other than natural causes, and there are grounds for suspicion that some one is criminally responsible, it becomes his duty to act, and he is the only judge of the necessity of the inquest; he is the only one to determine whether any suspicion exists as to the cause of death, and not the neighbors or relatives of the deceased: In re Coroner's inquest, 1 Pa. C. C. Reps. 14. And if, in the exercise of his judgment, he deems a post mortem examination or an autopsy necessary, he is the person to determine whether or not such autopsy shall be performed.

In Allegheny County vs. Watt, 3 Pa. 462. Chief Justice Gibson said: "To the taking of every inquisition *supervisum corporis*, perhaps without exception, a post mortem examination is indispensable." And

where the coroner employs a physician to perform such service he is employed by the county and is entitled to a reasonable compensation from the county for his services: *Allegheny County vs. Watt*, 3 Pa. 462. The autopsy is ancillary to the purpose of the inquest, and if the coroner has authority to hold the inquest, it follows that he has authority to employ a physician to perform the autopsy.

If we are right in the above conclusions, then the only grounds upon which the plaintiff can be defeated is that the coroner was guilty of an abuse of discretion in ordering the autopsy. In other words, the county in order to defeat the claim must overcome by competent evidence the presumption that the coroner acted in good faith and on sufficient cause. In this case we have no such evidence. From the facts as agreed upon, some one might have been criminally responsible for the death of this boy. If the driver of this car, seeing the boy upon the track, wilfully or negligently ran the car over him, he would have been answerable to the criminal law for such action.

From the case stated, it nowhere appears that any facts attending the death of this boy were known to the coroner prior to the holding of the inquest, or that they even could have been ascertained by him. We are therefore of opinion that the facts agreed upon are not sufficient to overcome the presumption that the coroner acted in good faith.

And we are further of opinion that the plaintiff in this case is entitled to recover from the county.

And now, to wit, November 17, 1905, the prothonotary is ordered to enter judgment in favor of the plaintiff and against the defendant for the sum of \$35 and costs.

An electric light company, knowing that employees of an independent contractor engaged upon work for it are to be employed upon a staging in close proximity to defectively insulated wires which sometimes carry a dangerous current, is held, in *Stevens vs. United Gas & E. Co. (N. H.)* 70 E. R. A. 119, to be bound to use at least ordinary care to protect them from harm which may result therefrom, since it owes them the same duty which it owes to those who come upon the property by its invitation.

In the Court of Common Pleas of Lackawanna County, No. 532, September Term, 1906.

DEMURRER TO PLAINTIFF'S STATEMENT.

County of Lackawanna, to the use of the City of Scranton vs. C. H. Schadt, et al.

The procedure Act of 1887, in express terms requires that the statement in an action of assumpsit, "shall be accompanied by copies of all notes, contracts, book entriess . . . upon which plaintiff's claim is founded.

A suit was brought on the official bond given to the county by a former treasurer. No copy of the bond was set forth in or attached to plaintiff's statement. No averment appeared that the bond has been surrendered by the county, nor was the absence of a copy of the bond satisfactorily accounted for.

Held: That the plaintiff's case was vitally defective and that the demurrer should be sustained.

Messrs. Burns & Davis, for plaintiff.

Messrs. Willard, Warren & Knapp and M. J. Martin, for defendants.

Opinion by Edwards, P. J., November 5, 1906.

This suit is brought on the official bond given to the county of Lackawanna by C. H. Schadt, a former county treasurer. There is no copy of the bond set forth in or attached to plaintiff's statement, although the condition of the bond is given, and the statement also avers the due execution of the bond by the defendants and its approval by the county commissioners. Nor is there any reason stated why a copy of the bonds is not made a part of the statement. The procedure act of 1887, in express terms requires that the statement, in an action of assumpsit, "shall be accompanied by copies of all notes, contracts, book entries * * * upon which which plaintiff's claim is founded. In the case of Acme Mfg. Co. vs. Reed, 181 Pa., 382, Justice Sterrett, in commenting upon this requirement of the procedure act, uses the following language: "This is not merely directory; it is absolutely imperative; and if the copy of the written or printed contract on which the action is founded, or any part thereof, does not accompany the statement, and its absence is not satisfactorily accounted for, the omission cannot be supplied by averments of the contents or the substance of the missing paper. Without the defendant's consent, such averments can-

not be accepted as the legal equivalent of the 'copy' or 'copies' required by the act, except in the case of papers shown to have been lost or destroyed."

We find the same matter referred to in *McGonnigle vs. McGonnigle*, 5 Sup. Ct. Rep., 168, wherein it is stated that the provision in the act requiring a copy of the instrument sued on to be in or with the plaintiff's statement is imperative, if the defendant chooses to insist thereon. In the case at bar the defendants "insist thereon" by filing a demurrer.

It is useless for us to discuss this question of pleading. Both appellate courts have definitely determined the matter. There is no merit in the contention that the procedure act does not refer to or include an official bond. A rule of pleading cannot be changed to suit the varying nature of different bonds. It is conceded that the terms of the act include bonds between private individuals. We see no difference, in a matter of pleading, between a private and an official bond. A copy of the instrument sued on, whatever may be its character, must accompany the statement.

We might end the discussion of this case here were it not for the fact that plaintiff's counsel stated orally at the argument that the county treasurer's bond had been surrendered by the county commissioners to the treasurer, and, therefore, that a copy of the bond could not be obtained. No such averment appears in the plaintiff's statement. We are not prepared to go so far as Judge Schuyler did in *Zimmerman vs. Kuebler*, 4 C. C. Rep., 607, wherein he states that the procedure act makes no exception in favor of instruments that have been lost or mislaid. We would rather follow the *dictum* in *Acme Mfg. Co. vs. Reed*, *supra*, that the absence of a copy of the instrument sued on might be "satisfactorily accounted for."

As the case is now before us it is clear that the plaintiff's statement is vitally defective. We, therefore, sustain the demurrer.

The right to sell a water right free from the land for which it was appropriated is held, in *Johnston vs. Little Horse Creek Irrig. Co.* (Wyo.) 70 L. R. A. 341, not to be cut off by statutes requiring an intending appropriator to apply to state officers for a permit, and to describe accurately the land on which the water is to be used.

*In the Court of Common Pleas of Lackawanna County, No. 1044,
September Term, 1905.*

MOTION TO TAKE OFF VOLUNTARY NON-SUIT.

Aaron A. Chase vs. Geneva E. Chase.

Desertion is a question of intention and any circumstances which render it proper that a wife reside elsewhere than with her husband is a valid defence. A wife could not live with her husband in the usual martial relation while he was prosecuting an action for divorce on the ground of infidelity.

The courts have said that when such a charge is made a regard for public decency requires that the parties should not live together.

A plaintiff has the right at any time before the jury has been called and announce their readiness to render their verdict to suffer a voluntary non-suit. But by doing so he withdraws himself and his cause from the court, and unless at the time of his withdrawal he obtains leave to move to take off the non-suit there is no way by which he may return save by an new action.

Messrs. George S. Horn and James Mahon, for plaintiff.

Mr. E. W. Thayer, for defendant.

Opinion by McClure, J., Specially Presiding, November 5, 1906.

A plaintiff has the right at any time before the jury have been called and announced their readiness to render their verdict to suffer a voluntary non-suit. But by doing so he withdraws himself and his cause from the court, and unless at the time of his withdrawal he obtains leave to move to take off the non-suit there is no way by which he may return save by a new action. This point was squarely decided by Judge Paxson, in *Koecker vs. Koecker*, 7 Phila., 371; and is in harmony with long established practice. *Garrett vs. Garrett*, 4 Yeates, 244; *Van Wormer vs. The Mayor, &c., of Albany*, 15 Wend, 262.

However, if we were convinced that the plaintiff was driven to withdraw his suit by the erroneous views of the court as to the law of the case, or if his right would be barred by not reinstating it, we might hesitate to enforce the strict rule of practice. But his right is not barred, and we are still of the opinion that his wife's absence from his home pending the former proceeding for divorce on the ground of her alleged infidelity was not such a willful and malicious desertion as would entitle him to a decree on that ground. There was no separation until the husband accused her of committing adultery and she did not leave him until after she had been served with a subpoena in divorce charging that offense. Desertion is a question of intention and any circumstances which render it proper that a wife reside elsewhere than

with her husband is a valid defense. How could a wife live with her husband in the usual marital relation while he was prosecuting an action for divorce on the ground of her infidelity? To live under the same roof has been held to be presumptive evidence of the continuance of the relation and a condonation of the offense. The courts have said that when such a charge is made a regard for public decency requires that the parties should not live together, and the legal presumption is that such separation took place by the procurement or with the assent and approbation of the husband. *Marsh vs. Marsh*, 14 N. J. E., 315; *Chipchase vs. Chipchase*, 48 Id. 549; *Ford vs. Ford*, 143 Mass., 577; *Poritt vs. Poritt*, 18 Mich., 420. *Wagner vs. Wagner*, 39 Minn., 394, is easily distinguished from the above authorities as well as the case at bar. There the wife had deserted her husband without cause long before the suit for divorce on the ground of adultery was instituted by her husband, and by her wrongful conduct while away induced the action. The charge of adultery in no way influenced her action, and had nought to do with her desertion of her husband.

Motion dismissed.

*In the Court of Common Pleas of Lackawanna County, No. 1046,
September Term, 1906.*

DEMURRER TO RETURN.

*Commonwealth of Pennsylvania, ex. rel. District Attorney vs. The
Mayor and Councils of the City of Carbondale.*

Cities of the third class must publish their financial statements annually. This should be done in April or May of each year. A publication once in one newspaper is sufficient to meet the requirements of the law, although the councils may, in their discretion, publish the statement in two newspapers and more than once.

An application for a mandamus requiring councils to publish such statement should be made within a reasonable time.

A plaintiff is guilty of laches who makes such application a year after May. Technically a plaintiff is entitled to judgment against the councils when the return to the mandamus is made by the mayor only and in his own behalf only.

Mr. J. F. Reynolds, for plaintiff.

Opinion by Edwards, P. J., November 5, 1906.

The return to the mandamus in this case is made by the Mayor only and in his own behalf only. There is no return made for the

councils. Technically the plaintiff would be entitled to judgment against the councils regardless of the merits of the controversy. Nevertheless, we shall overlook this defect in the pleading and shall decide the case upon its merits.

Carbondale is a city of the third class. The act of May 23, 1889, section nine, provides as follows: "The fiscal year of said cities of the third class shall begin on the first Monday of April in each any every year. The councils shall, at the end of the fiscal year, cause to be published in the month of April or May, in not more than two newspapers printed and circulated in said city, a summarized statement of the receipts and expenditures of the city, during the preceding year, its present funded debt, and a schedule of its assets with the character and value thereof, and the amount of taxable property therein."

The suggestion sets forth that the mayor and councils of the city of Carbondale have failed to publish in the years 1905 and 1906 the "summarized statement" required by the act of assembly. The return to the mandamus practically admits this fact. There can be no question as to the proposition that the provision in the act is mandatory and not directory. The councils have no discretion except as to the number and selection of the newspaper or newspapers in which the statement shall be published. The duty enjoined concerns the public. The citizens of Carbondale are entitled to the information, which such a statement should contain relative to the financial condition of the city. Each citizen cannot go to the controller's office to examine the statement; therefore the law provides publication of the statement as the proper means to convey the desired information to the public. Publication in one newspaper published in the city is sufficient to meet the requirement of the act of assembly; but an annual publication is imperative, because the law says so in plain and unambiguous words.

The plaintiff asks that the respondents be required to publish the 1895 statement as well as that of 1906. We do not think the respondents are bound to publish the 1905 statement at this late day. For the practical purpose of giving information the publication of the statement in 1906 will be sufficient. Looking at the matter from a legal standpoint we hold that the plaintiff, so far as the 1905 statement is concerned, is guilty of laches. The application for a mandamus should have been made within a reasonable time after May, 1905. The law provides that

the statement shall be published in April or May of every year. It is true that the provision as to the month is directory and that the statement may be published later in the year; but a suggestion for a mandamus filed in August, 1906, praying for an order to compel the publication of the statement of the preceding year, considering the purpose or intent of the law, is clearly too late. Even as to the statement for 1906 there has been some delay in asking for a mandamus; but the delay does not amount to laches and the plaintiff is entitled to be heard as to the publication of this particular statement.

There can be no question as to the law. Cities of the third class must publish their financial statements annually. This should be done in April or May of each year. A publication once in one newspaper is sufficient to meet the requirement of the law, although the councils may, in their discretion, publish the statement in two newspapers and more than once.

The demurrer is sustained and judgment is entered for the Commonwealth.

We make the following order: A peremptory mandamus is awarded directing the commanding the respondents, particularly the councils of the city of Carbondale, to cause to be published forthwith in not more than two newspapers printed and circulated in the city of Carbondale, a summarized statement of the receipts and expenditures of the city during the preceding year, its present funded and floating indebtedness, and the date of the maturity of the funded debt, a schedule of its assets with the character and value thereof, and the amount of taxable property therein.

We also direct the city of Carbondale to pay the costs of these proceedings.

A corporation maintaining poles to support electric wires is held, in *Towne vs. United Electric G. & P. Co.* (Cal.), 70 L. R. A. 214, to perform its duty by furnishing pike poles for handling such poles, of the ordinary kind and in good condition, and not to be liable for an injury to an employee caused by the use of a pole upon which the point has become blunted or dull, so that it can no longer be relied upon as a brace for poles which are being taken down.

In the Orphans' Court of Lackawanna County, No. 714, Series C.
**SUR PETITION FOR A DECREE FOR THE SPECIFIC PER-
FORMANCE OF A CONTRACT.**

In Re. Petition of Patrick W. Feeley, Deceased.

A contract for the sale of real estate at the option of the vendee, only upon election and notice, may be specifically enforced.

When any deceased person was bound by a contract in writing to convey any real estate, a specific performance by the executor or administrator may be decreed in the Orphans' Court, in all cases, where the deceased, if living, could be compelled to execute a conveyance.

In the case of articles of agreement, leasing land with the right to purchase, though such right vests solely with the purchaser, it may be enforced by the purchaser; and the death of either vendor or vendee before the time of completing the contract is entirely immaterial.

A widow to whom a legacy or devise is given by the will of her husband, which if accepted by her, would be a bar under the act of assembly to all future claims of dower, may make her election in pais, and she shall be afterwards bound by it, when it is done freely and deliberately.

Election means a choice between two courses of action, acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights the law gives her.

Probating the will, taking out letters testamentary, taken in connection with a notice to quit and by further acts in pais, determined the widow's election, and she is therefore bound thereby.

Mr. C. P. O'Malley, for petitioner.

Mr. T. P. Duffy, for respondent.

Opinion by Sando, P. J., June 30, 1906.

Patrick W. Feeley, leased to W. W. Jones and David Jones, a certain lot of land in the Borough of Olyphant, for a term of five years from August 1st, 1900, the lease containing the following clause: "The said lessor hereby grants the privilege to the lessees to purchase the said messuage or lot of land at any time within the said term or any renewal thereof, for the price or sum of Twelve hundred and fifty (\$1250) Dollars." On the 25th day of December, A. D. 1900, Patrick W. Feeley died testate, leaving to survive him a widow, Mary Feeley, and two minor children. The widow, and James H. Feeley, a brother, were named as the executors. James H. Feeley renounced; the will was probated and letters testamentary granted January 10, 1901; to Mary Feeley. By the will Mary Feeley was also appointed guardian of the minor children. On the 6th of June, 1905, W. W. Jones notified Mary Feeley that the lessees would pay her the purchase price mentioned in the lease, for the property, on the 1st day of August, 1905. On the 1st day of August, 1905, when W. W. Jones tendered Mary Feeley

the sum of twelve hundred and fifty dollars in gold coin she refused to deliver a deed for the property, and notified the lessees that she would not comply with the covenant in the lease. She now contends that the covenant in the lease was merely a privilege which could not be taken advantage of by the lessees after the lessor's death, and that there is no contract which she as executrix is bound to fulfill. The petitioners aver that they have improved the property by erecting thereon a printing house, laid stone sidewalks and made other improvements at an expense aggregating the sum of \$1724.56; and that they are ready and willing to comply with the terms at any time when Mary Feeley in her own right and as guardian of the minor children and executrix shall comply with her portion of the contract. The petition for a decree for specific performance was filed August 9, 1905; the citation was returnable to September 18, 1905; the widow's election to take the share coming to her under the intestate laws of the Commonwealth was filed September 15, 1905, and the respondent's answer to the petition was filed September 16, 1905.

The last will and testament of the testator provides inter alia:

(a) "I give devise and bequeath to my wife Mary Feeley, for the term of her natural life, my house and lot on Jones Street, Olyphant, and all the rents and incomes accruing therefrom, in accordance with the terms of a certain lease in which I am the lessor and Jones Brothers * * * are lessees; the said rent (namely, \$75 per year in advance) and taxes on the house, erected on said lot, to be paid by said Jones Brothers. I desire and will that my said wife take my place fully in regard to the said premises, and that she use the rents and incomes therefrom for her own maintenance, and for the maintenance and education of my two children * * * or the survivor of them * * *. And in case both my said children shall die before my said wife, then the said premises shall go to my said wife absolutely."

(b) "That, in case it should at any time be necessary to sell said premises for the maintenance of my said wife and for the maintenance and education of my said two children, my executors * * * shall have power to mortgage or sell said premises * * *."

(c) "All money or moneys belonging to me in the Merchants' and Mechanics' Bank of Scranton, Pa., I desire my executors to use the same for the proper maintenance of my wife, and for the proper main-

tenance and education of my children, Will and Mary, if the same should be necessary, or required, for such purposes. And if there should be left a surplus of said money or moneys, unused for the purposes just described, then such surplus, or balance, shall be used by my said wife to the best advantage of herself and my said children, William and Mary.

The present proceedings presents two questions, which may be briefly stated thus:

(a) Did the testator make a contract enforceable in this Court.

(b) Whether or not, the action of Mrs. Feeley, is sufficient to bar her dower.

In Waterman on Specific Performance, at Section 200, it is stated that "it is well settled that an optional agreement to convey or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it be made upon proper consideration, or forms part of a lease or other contract between the parties * * *. A contract for the sale of real estate at the option of the vendee, only upon election and notice, may not only be specifically enforced, but the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election."

The remedy provided by the Act of February 24, 1834, for specific performance of a decedent's contract for the sale of land in the Orphans' Court, fully supplies the common law remedy of an action for damages for the non-fulfillment of such an agreement, and such common law action can no longer be sustained. The principles that underlie the rules regarding specific performance have been justly deemed equitable in their nature and enforceable by courts of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice.

When any deceased person was bound by a contract in writing to convey any real estate, a specific performance by the executor or administrator may be decreed in the Orphans' Court, in all cases, where the deceased, if living, could be compelled to execute a conveyance. The Orphans' Court, in cases within the purview of the fifteenth, six-

teenth, seventeenth and eighteenth sections of the act of February 24, 1834, P. L. 70, has the same power and authority as a court of equity.

Any memorandum in writing indicative of the intent of the parties, and so precise as to enable the inquirer to ascertain the terms of the contract, the land to be conveyed, and the price to be paid for it, is a sufficient contract in writing to be enforced specifically: *McFarson's App.* 11 Pa. 503.

In the case of articles of agreement, leasing land with the right to purchase, though such right vests solely with the purchaser, it may be enforced by the purchaser; and the death of either vendor or vendee even before the time of completing the contract is held entirely immaterial: *Winged vs. Lofebury*, 2 Eq. Cas, Abr. 32 Pl. 43; *Paul vs. Wilkins*, *Tothill* 106; *Baker vs. Hill* 2 Ch. R. 113.

In the case of *Kerr vs. Day*, 2 Harris, 112, where, in the case of a lease with the stipulation that the lessee should have the privilege of purchasing the land during the continuance of the term it was held, reversing the judgment of the court below, that the agreement giving the option to purchase was not a mere personal covenant, but a right, which resting solely with the lessee, might be transferred to his vendee, and enforced, at his election, with the same effect as if the contract had been absolute in its terms. Such a stipulation is in the nature of a continuing offer to sell, and when accepted by the lessee a contract of sale is completed: *Williard vs. Taylor*, 8 Wall. 557.

The right of the petitioners to demand specific performance of the testator's contract is not affected by the fact that the contract is unilateral, in the sense that the vendees were not bound until they signified their acceptance of its provisions. If the owner of an estate has fairly made a contract for a sufficient consideration, by which he has stipulated that another person may, at the option of the latter, receive a conveyance of the estate upon the payment of a fixed sum within a given time, what principle of equity is violated by making the owner comply with his contract?

In the present case the privilege to purchase the fee was inserted in and made a part of the indenture of lease. It appears, too, that an estate which was to be purchased at \$1250, has been improved by the tenants to the amount of \$1724.56. This has been done in view of their privilege to secure to themselves both land and improvements by paying

the stipulated price. The testator died before the expiration of the five years, and within that period the petitioners declared their option to purchase, according to the provisions of the lease. An estate under contract of sale is regarded as converted into personalty, from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and if the seller die before the election be exercised, the purchase money, when paid, will go to his executors as assets: *Sikes vs. Lister*, 5 Vin. Abr. 561, Pl. 28; *Baden vs. Pembroke*, 2 Vern, 213.

The stipulations, on one side, to lease the lot for a period of five years, with the right of the lessees, within that time to purchase the same at the price stated in the lease, and, on the other, to pay the rent and price agreed upon, must be considered as constituting one entire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent must be deemed to have been made in consideration, as well for the privilege of becoming purchaser of the lot, as for its use.

The evidence shows that the petitioners complied with all the provisions of the lease under which they occupied the premises as tenants. If they tendered performance of the contract, as further shown by the evidence, they are entitled to a decree of specific performance.

The Act of April 8, 1833, Section 11, P. L. 250, provides, "That a devise or request by a husband to his wife of any portion of his estate or property shall be deemed and taken in lieu and bar her dower in the estate of such testator, in like manner as if it were so expressed in the will, unless such testator shall in his will declare otherwise: Provided, that nothing herein contained shall deprive the widow of her choice either of dower or the estate or property so devised or bequeathed."

The Act of March 29, 1832, Section 35, P. L. 200, gives the widow twelve months to make her election, to say whether or not she will accept the provision made for her by the will, or take her dower in the lands and her share of the personal estate.

It has been decided in *Cauffman vs. Cauffman*, 17 S. & R. 16, that a widow to whom a legacy or devise is given by will of her husband, which if accepted by her, would be a bar, under our Act of Assembly, to all future claim of dower at law, may make her election in pais, and shall be afterwards bound by it, when it is done freely and deliberately.

Election in the sense that applies to the present contention, means a choice between two courses of action, acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights the law gives her. There is no third course. Her legal rights, which are paramount to her husband's control, attach the instant he dies. She must make a choice, and it is will or no will. The quality of the estate as to her rights is fixed at the moment of death, and she must take one or the other as they were then. The election which the widow is required to make is between rights, not between benefits. She has the right to abide by her husband's disposition of his property, or the right to over-ride it and claim under the intestate law. These rights are inconsistent. She has always the choice which she will assert, but the choice is one or the other, not both, and does not legally depend on the quantum she receives or renounces under it.

Whether the widow has made her election to take under her husband's will, is now, the material question to be determined. Has she done such acts as determine her election, and preclude her now from claiming her statutory dower? Her election may be made in pais, either expressly, by an explicit declaration, or impliedly, by unequivocal acts indicating such an intention. The acts relied on as constituting such election should be done by her with knowledge of the material and necessary facts to make her election understandingly, and with the intention, at the time, to submit to and acquiesce in the provisions of the will.

The thirty-fifth section of the Act of March 29, 1832, gives a widow twelve months in which to elect whether she will take under the will of her deceased husband or take her dower. It also provides for the issuing of a citation by the Orphans' Court, and that a record be made of her election. Whenever this method is not resorted to, and her election is sought to be shown in pais, it must be by clear and satisfactory evidence that the widow acted under a full knowledge of the property and of her rights: *Bierer's Appeal*, 98 Pa. 265. Filing a formal paper, electing to take against the will is proper for convenience and certainty of evidence, but is not otherwise important: *Light vs. Light*, 21 Pa. 407; *Bradford's vs. Kent*, 43 Pa. 474; *Kennedy vs. Johnston*, 65 Pa. 451.

In the case before us, the testator died December 25, 1900. The will was taken by the widow, accompanied by her lawyer, to the office

of the Register, probated, her oath as executrix filed and letters testamentary granted January 10, 1901. Before the probate of the will, the widow went to the Merchants' and Mechanics' Bank and drew the money there belonging to the testator, amounting to about \$300. After the probate, the letters testamentary was taken to the bank, to show the widow's authority for drawing the money. As a copy of the will was attached to the letters, the widow had ample opportunity if she saw fit, to become familiar with its provisions. The widow collected the rents. The rent was paid quarterly by checks drawn to the order of Mrs. P. W. Feeley, and the checks endorsed by her as "Mrs. P. W. Feeley" or "Mrs. Mary Feeley," for a period from August 3, 1901, to March 15, 1904. The money received from the rent, since the death of the testator, was used by the widow, to pay testator's debts, to re-pay money borrowed to assist in paying the debts of the testator, and towards the maintenance of herself and her children. On July 31, 1905, a notice to quit the leased premises "which you hold as tenant under me by virtue of the lease dated the first day of August, 1900, signed by Patrick W. Feeley, lessor," was served on the petitioners. The notice to quit was signed "Mary Feeley," and could only have been given by the widow as devisee under the will, or as the guardian of the testator's children.

There is nothing equivocal in the notice to quit. The widow could give this notice in no other capacity than given to her by the will, as devisee or guardian. It is signed "Mary Feeley," and we think amounts to conclusive evidence of election. It is conclusive in equity, that where any person having a claim on a man's estate, independently of him, and also a claim on his estate under his will, which claims are repugnant to each other, pursues the latter, the former is thereby waived and abandoned.

In the present case, we think the widow has made a binding election, and one that bars her dower. Probating the will, taking out letters testamentary, taken in connection with the notice to quit and by further acts in pais, signified and determined her choice and election, and she is therefore legally bound thereby.

Now, the 30th day of June, 1906, after due consideration of the evidence submitted, and no sufficient cause being shown to the contrary, we do adjudge the facts to be sufficient in equity, and do order and decree the specific performance of the said contract according to the true intent and meaning thereof. Counsel to submit formal decree.

In the Court of Common Pleas of Lackawanna County, No. 146, March Term, 1906.

MOTION TO QUASH PETITION.

In Re. Removal of R. F. Walker, Justice of the Peace.

A proceeding to impeach a Justice of the Peace is not a judicial proceeding, under the constitution in force, when the Act of 1804 was passed, or under the present constitution.

Mr. J. W. Carpenter, for petitioner.

Messrs. J. E. Brennan and C. P. O'Malley, for respondent.

Opinion by Newcomb, A. L. J., August 13, 1906.

This proceeding purports to be a case pending in this court. That is a fundamental error. The petition of upwards of twenty persons representing themselves to be taxable inhabitants of Fell township, was presented to the president judge, to whom it was addressed, January 22d, this year. It set out a complaint against R. F. Walker, a justice of the peace of that township, seeking his impeachment and removal from office, by the legislature, under the act of January 14, 1804, 4 Sm. Laws, 107; 1 P. D., 1152, pl. 153. Thereupon an order was made "by the Court," directing a constable to summon the justice to appear "before this Court" on a day certain. The petition and order were then filed of record and given the above number and term. This was followed by the present motion founded upon various allegations going to the good faith of the petition and the qualification of the signers.

It was a mistake to suppose that the case is a judicial proceeding. The court has nothing to do with it. That question was fully discussed in *Kelly vs. Lacka. Co.*, 4 L. Jurist, 127. The statute confers upon the judge to whom the petition is presented certain ministerial but no judicial duties. He has nothing to decide. He has only such power as is necessary to procure the attendance of witnesses whose testimony he is to reduce to writing. That is the extent of his functions, except to transmit the testimony to the proper officer at Harrisburg for the use of the legislature. The law doesn't contemplate the filing of any papers in court. The petition is to be sent forward to the legislature with all the other papers pertinent to the case. That cannot be done if it is made a matter of record here, for like other records of the court it would have to remain here if once properly filed.

The proceeding is *coram non judice*, and for that reason the order of January 22d, as well as the rule to quash the petition, are vacated. Leave is granted to the petitioners, by themselves or attorney, to withdraw the petition from the files so that they may proceed upon it according to law, if they so desire.

In the Court of Common Pleas of Lackawanna County, No. 12, September Term, 1906.

EQUITY.

*Commonwealth of Pennsylvania, ex rel. H. D. Johnson, Inspector, etc.
vs. Elliott, McClure & Company.*

Section 5 of Article IV, Act of June 2, 1891, P. L. 176, provides that "No inflammable structure shall be erected over the entrance of any opening connecting the surface with any underground workings of any mine and no breaker or other inflammable structure for the preparation or storage of coal shall be erected nearer than 200 feet over such opening * * * ; provided, that this section shall not apply to breakers that are now erected."

A breaker erected in 1886 over a shaft was destroyed by fire on June 23, 1906. Soon after the fire the owners began to rebuild on the old foundation.

On a rule for a preliminary injunction, restraining the owners from rebuilding, it was held that the proviso amounted to an exception which took the case out of the operation of Section 5, Article IV, of the statute.

Messrs. D. J. Reedy and Robert Murray, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Newcomb, A. L. J., August, 1906.

This case was heard on a rule for a preliminary injunction. At the hearing it was put at issue by answer and replication filed, and by agreement of parties the cause proceeded with as upon final hearing. Therefore I state the following

CONCLUSIONS OF FACT:

1. H. D. Johnson, the complainant, is one of the inspectors of the Second Anthracite coal inspection district of this commonwealth. The colliery hereinafter mentioned is in sub-division No. 5, of the district, and for purposes of state inspection is under his supervision.

2. The defendant company is a copartnership operating a colliery in the township of Old Forge, in this county, known as the Sibley mine. Actual mining has been interrupted since June 23d by reason of the casual destruction of the company's breaker on that date by fire.

3. The breaker was built in 1886 to replace another destroyed by fire at that time. The first one was built in the early '70s.

4. The site of the breaker was over a shaft by which it was connected with the underground workings. As soon as practicable after the fire the company prepared to rebuild on the old foundation, and were about proceeding with their construction when the plaintiff, by the advice of the state department of mining, brought this suit. The proposed building is to be a frame structure.

5. The purpose of the complainant is to test the right of the defendants to rebuild their breaker over the shaft or within two hundred feet thereof, in view of the provisions of Section 5, Article IV, Act of June 2, 1891, P. L. 176.

Out of these facts arise the following

CONCLUSIONS OF LAW:

1. The section of the statute in question provides that "No inflammable structure * * * shall be erected over the entrance of any opening connecting the surface with any underground workings of any mine, and no breaker or other inflammable structure for the preparation or storage of coal shall be erected nearer than two hundred feet to any such opening * * *; Provided, that this section shall not apply to breakers that are now erected."

2. The proposed structure is not within the prohibition of this statute, but is excepted therefrom by force and effect of the proviso.

3. The rule for a preliminary injunction should be discharged.

4. The bill should be dismissed.

5. Under the circumstances of this case each party should pay his own costs.

DISCUSSION.

The case calls for no new discussion. Its determination depends wholly upon the effect of the proviso in the section of the statute quoted. This court is already on record upon the construction of that clause. In a case previously analogous on its facts we held that the proviso amounted to an exception which took the case out of the operation of section 5, article 4, of the statute.

Com. ex rel., &c., vs. Coal Co., 5 Lacka. Jur., III, to which we refer for further discussion of the grounds upon which this conclusion was based.

Nothing has been suggested nor does any reason appear for changing the views therein expressed by Edward, P. J. His reasoning followed that of Judge Hand in an earlier case construing a similar provision in the act of June 30, 1885, P. L. 226. See *Com. vs. Smith*, 4 C. P. R. 1.

The same principle was affirmed in *Com. vs. Vipond*, 14 C. C. R. 357. The question there concerned the right to locate a boiler within one hundred feet of a breaker, which is prohibited by another section of the same act subject to a proviso in the same words.

This was reaffirmed in *Co. vs. Coal Co.*, 5 Lacka. Jur. 364, although on its facts that case was held to be within the prohibition of the statute and not within the exception.

In the light of these authorities, the facts being free from dispute, the legal question at issue is, so far as this court can determine it, no longer open to debate. If there is any case in which this part of the act of 1891 has been considered by either of the appellate courts we have been unable to find it.

Let a decree *nisi* be entered in accordance with the foregoing conclusions; notice to be given to the parties by the prothonotary, and exceptions, if any, filed within ten days.

*In the Court of Quarter Sessions of Lackawanna County, No. 420,
April Sessions, 1904.*

EXCEPTIONS TO REPORT OF COMMISSIONER AND PETITION FOR REVIEW.

In Re. Redivision of the Wards of Winton Borough.

A review of a report of commissioners, under the Act of May 14, 1874, P. L. 159, is not a matter of right. The judicial discretion of the court must be moved in the usual way—by evidence.

Opinion by Edwards, P. J., August 13, 1906.

Proceedings were begun in April, 1904, under the act of May 14, 1874, P. L. 159, for the purpose of re-arranging and redividing the wards of the borough of Winton. Petition was filed signed by 62 freeholders. We appointed three commissioners as provided by the act. The majority of the commissioners filed a report against a redivision. The other commissioner filed a report in favor of a redivision. Except-

tions have been filed to the majority report. There is no evidence to sustain the exceptions, the act of assembly providing that "should exceptions be filed, they shall be disposed of on evidence." The exceptions probably were filed so as to prevent a final confirmation of the report before an opportunity was had to present a petition for review. At any rate, the first three exceptions, which are of a technical character, are met by the papers accompanying the minority report; the fourth exception goes to the merits but is unsupported by evidence.

A petition for a review is presented signed by 148 freeholders. The law provides "that if desired, a review may be had if, in the opinion of the court, it may be necessary, to secure a fair adjudication of the same." A review is not a matter of right. The judicial discretion of the court must be moved in the usual way—by evidence. In the present case there is no evidence. We have nothing but the statements and arguments of counsel on one side and on the other. We have no alternative but to dismiss the exceptions and refuse a review.

Now, August 13, 1906, exceptions dismissed and petition for review refused.

In the Court of Common Pleas of Lackawanna County, No. 337, September Term, 1904.

**RULE FOR JUDGMENT FOR DEFENDANTS' NON OB
STANTE VEREDICTO.**

City of Scranton vs. M. C. Anslèy, et al.

Scranton became a city of the second class, by reason of an increase in population, under the Act of March 7, 1891, P. L. 20. In 1902 the councils passed an ordinance providing for the construction of a lateral sewer, the cost to be assessed on the abutting property by the foot front. This ordinance was in accordance with Art. XIII, Sec. 1, of the Act of May 23, 1889, P. L. 302, providing for the government of cities of the Third Class.

An assessment was filed against defendant's property in pursuance of this ordinance and upon a scire facias to collect said assessment a verdict was directed for the city. Defendants took a rule to show cause why judgment should not be entered in their favor non obstante veredicto. The question raised was whether the city had power to make the assessment under the Act of 1889, after it had ceased to be a city of the Third class.

Held: Art. XX of the Act of March 7, 1901, P. L. 20, covers the Act of 1889 as affected by the Act of 1891 so far as it relates to special assessments for sewers.

Mr. D. J. Davis, City Solicitor, for plaintiff.

Mr. E. W. Thayer, for defendants.

Opinion by Newcomb, A. L. J., February 17, 1906.

By ordinance approved Sept. 22, 1902, this city provided for the construction of a lateral sewer on Meridian street, the cost to be assessed on the abutting property by the foot front. This was in accordance with Art. XIII, Sec. 1, of the Act of May 23, 1889, P. L. 312, providing for the government of cities of the Third Class. On a scire facias to collect an assessment filed against defendants' property in pursuance of this ordinance, a verdict was directed for the city subject to a question of law reserved. A rule for judgment for defendants' *non obstante* was discharged November 26, 1905.

The question raised was whether the city had power to make the assessment under the Act of 1889, after it had ceased to be a city of the Third Class, which it did in 1901 by reason of an increase in population. It was a city of the Second Class when the ordinance was passed and subject to the Act of March 7, 1901, P. L. 20.

Art. XX of this Act provides that "All laws relating to cities of the Third Class shall continue to apply to cities of the Second Class which have passed or may pass into a city of the Second Class by reason of an increase of population, except so far as such laws are supplied by or in conflict with laws relating to cities of the Second Class."

The controversy arose over the proper interpretation of this exception. It was contended that the Act of May 16, 1891, P. L. 75, being general and, therefore, applicable to all cities is a "law relating to cities of the Second Class," within the meaning of the exception which supplied this city with a method of laying sewer assessments on the property benefited by the improvement, and thus the method provided by the Third Class city legislation was excluded. The city, on the other hand, took the position that the words "supplied by" were to be construed in the sense of substitution of one Act for another, and that was not the relation of the Act of 1891 to that of 1889, as the contrary had been held in *Hand vs. Fellows*, 148 Pa., 456, where both were considered and it was decided that they could stand together so far as cities of the Third Class are concerned. This reasoning was adopted as it seemed to result inevitably from what was said in that case by the Appellate Court. It was accordingly held that in this city both Acts are

operative and that the assessment in dispute could be made under either Act at the option of councils.

At the instance of defendants a re-argument was granted, and upon further consideration we are of opinion that this conclusion is untenable, because it leads to the result that this city alone would have the right to make such assessment under the Act of 1889. Neither Pittsburg nor Allegheny City could avail itself of that Act, as they did not and never could become cities of the Second Class by reason of an increase of population. In the absence of some necessity (the existence of which has been uniformly held to be the only ground upon which classification can be sustained), it is not to be assumed that the legislative intent was to give this city any power peculiar to itself. By means of the Act of 1891, this, as well as all other cities, was supplied with a method of imposing the cost of sewers on the property benefitted by their construction. Hence there was no necessity arising from want of power to lay such special assessments, to justify carrying into the new charter that part of the Act of 1889 relating to such assessments. But, regardless of its intent, if its effect Article XX of the Act of 1901 is productive of a purely local result, we can see no escape from the conclusion that it would be unconstitutional. In *Scranton School Dist. Appeal*, 113 Pa., 176, it was said: "All our recent decisions are to, the effect that if local results either are or may be produced by a piece of legislation it offends against the Article prohibiting local or special legislation." This was reiterated in *Ayars Appeal*, 122 Pa., 266, and has been cited with approval in many other instances. If this city may at its option use the Third Class City act of 1889 in assessing the cost of municipal improvements, it follows that its affairs are to that extent regulated by a local law, and that it has a special method of its own for the creation of liens, both of which are forbidden by the constitution. If, therefore, Article XX of the Act of 1901 can be fairly construed so as to avoid that effect such construction is to be adopted.

It is believed that its purpose was to provide for resort to the former charter only in case of necessity, in order to insure regular and stable government without risk of derangement or interruption by reason of the transition from one class to the other, and not to continue in force any Third Class city legislation where, under the new charter or by general laws, the city is clothed with sufficient authority to act in

the premises. For, viewed as a grant of power, the exception mentioned takes out of the grant two descriptions of laws enacted for the government of cities of the Third Class:

1. Those conflicting with; and, 2. Those the function of which is adequately supplied by other laws applicable to cities of the Second Class.

The latter covers the Act of 1889 as affected by the act of 1891 so far as it relates to special assessments for sewers. That the two acts differ in the method prescribed for ascertaining the *pro rata* share of the assessment to be borne by the several properties liable to it, is of no moment. That is a matter of mere detail not at all essential to the question whether the city had adequate power outside of the act of 1889 to lay this assessment, and that is the true question in the case.

As ordinarily used the two phrases "supplied by" and "in conflict with" are not identical in meaning. Hence, it is not to be presumed that the legislature intended thereby to designate the same thing. To so construe them would be contrary to familiar rules of interpretation. Yet if the city's position be tenable it must be by force of such construction; that is to say, by narrowing the scope of the exception in Art. XX so that it would include only such Third Class city laws as are in conflict with laws applicable to cities of the Second Class. For, its construction as already noted, is founded upon the proposition that according to the authority of *Hand vs. Fellows*, *supra*, there is no such conflict between the act of 1889 and the act of 1891 as to produce a repeal of the former by implication. This reasoning would make the words "supplied by laws relating to cities of the Second Class" mere surplusage, and would produce the local result above pointed out. That is avoided by the other construction which commends itself as the rational and sensible view, and amounts to this, that nothing short of necessity will warrant the city in asserting any authority under the act of 1889 providing for the government of cities of the Third Class.

It follows that the assessment in this case was unwarranted by any valid ordinance and is void. The judgment heretofore entered is now opened, the rule for judgment for defendants *non obstante*, etc., rein stated and thereupon made absolute, and judgment is now ordered to be entered for the defendants notwithstanding the verdict, upon payment of the jury fee.

*In the Court of Common Pleas of Lackawanna County, No. 320,
January Term, 1902.*

EXCEPTIONS TO REPORT OF REFEREE.

Mary C. Ansley et al. vs. The City of Scranton.

Plaintiff's property was injured by repeated overflow of a public sewer. The overflow was due to an obstruction negligently suffered to remain by defendant. The latter had actual and constructive knowledge of the obstruction prior to any injury occurring. Defendant maintained that the inundation had occurred more than once prior to the period of six years next before suit brought, and in consequence plaintiff was chargeable with knowledge that it would recur with any similar storm and was, therefore, guilty of contributory negligence.

Held: That the plaintiff had no reason to expect that the sewer would not be put in proper repair. It was a case where the city was in duty bound to make necessary repairs to one of its public improvements. The plaintiff was entitled to rely upon the performance of that duty.

Mr. E. W. Thayer, for plaintiff.

Mr. D. J. Davis, City Solicitor, for defendant.

Opinion by Newcomb, A. L. J., December 10, 1906.

The plaintiffs sued as the personal representatives of Joseph C. Ansley, who died in March, 1901, siezed of the two lots with their improvements which form the subject matter of the injury complained of. The lots are on either side of Meridian street, this city. One was improved with a planing mill, glazing mill, office, lumber sheds, etc., and is known in the case as the "Mill Lot"; the other was improved with barns, as well as sheds and unenclosed skidways for the storage of lumber, and is known as the "Barn Lot." Together they constituted the site and plant of a general lumber business which had been carried on by the owner for many years up to the time of his death.

In part the injury was occasioned by the repeated overflow of a public sewer locally known as the Washburn street sewer, which affected only the barn lot; and in part by the flow of surface water along the course of the Scranton street sewer, which affected only the mill lot. In the one case the overflow of sewage is alleged, and upon sufficient evidence was found to be due to an obstruction negligently suffered by the city to remain in the Washburn street sewer whereby the sewage repeatedly broke out on land adjacent to and on a higher level than the barn lot, whence it inevitably found its way on to the lot to the injury of the buildings as well as the lumber and other property stored there. As to knowledge of the obstruction it was found that the proper city officials had both actual and constructive notice of its exist-

ence prior to the earliest injury covered by the assessment of damages.

As to the other lot the allegation is that the flow of surface water was due to the failure of the city to give proper attention to the catch-basins constructed by the city to carry the water into the Scranton street sewer, whereby they became frequently obstructed, thus causing the injury. The facts, however, on this branch of the case, have been found against the plaintiffs, and in the absence of manifest error we cannot review the finding. That disposes of the mill lot.

As to the barn lot the facts found show that the obstruction formed years ago; that being suffered to remain obstructed, at intervals with every considerable rainstorm during a period of six years prior to Mr. Ansley's death the sewage broke out; that the damage occasioned thereby included injury to the two barns as well as to the lumber and other personal property kept there; that the proximate cause of the injury was the neglect of the city to remove the obstruction after notice of its existence.

But the undisputed fact being that the inundation had occurred more than once prior to the period of six years next before suit brought, it was held that Mr. Ansley was chargeable with knowledge that it was likely to recur with any similar storm and was, therefore, guilty of contributory negligence in so far as he used the lot or the buildings thereon during that time for the storage of lumber. Hence the plaintiff's recovery was restricted to three elements of damage, namely; the cost of cleaning one barn after each flood; the loss of its rental value, and the cost of repairs that eventually became necessary to the other barn.

On various grounds exceptions have been filed on both sides; but the correctness of the referee's conclusions is believed to be open to question only upon his ruling as to the owner's contributory negligence.

The existence of negligence, if any, in such case is generally a mixed question of law and fact. The facts, however, upon which it is predicated here, are simple and free from dispute. Hence it virtually resolves itself in this instance into a question of law and as we understand it, has been so ruled by the referee. In his ninth finding of fact he says: "The plaintiffs' testator was guilty of contributory negligence in replacing his lumber and other personal property where he was bound to know from prior experience that it was likely to be flooded and injured with the recurrence of every considerable rainstorm, and

there is no evidence that any of the storms were extraordinary."

There is no finding that the obstruction was permanent in character, nor that the deceased had reason to so consider it. His act in continuing to use the lot for the purposes of the business which he had established there years before the sewer was built, is not found to have been negligent in that it was not the act of an ordinarily prudent man under the same circumstances. Neither is it found that he had no reason to expect that the sewer would be put in proper repair, nor do we see how it could have been so found.

Referring to the claim for loss of personal property and plaintiffs' theory as to the extent of the injury to lumber in piles by absorbing water from the bottom the referee says: "This theory was controverted by witnesses on part of the defendant and as *under my view of the law* (the italics are ours) the plaintiffs, owing to contributory negligence are not entitled to recover for these items of damage, I make no finding of the actual amount under this head."

This in connection with what he says in his general discussion makes it clear that the continued use of the lot for the storage of lumber and other incidental purposes was held as a matter of law to be negligence.

In this we cannot agree with the learned referee. He conceived the case in that respect to be ruled by what was held in this court in *Hartman vs. The Steel Co.*, No. 815 September Term, 1902. But we think he overlooked a clear distinction between the two cases arising from the nature and character of the proximate cause of the injury. There the plaintiff claimed, among other things, for loss of merchandise kept in the basement of his house located near the Lackawanna river. The channel of the river had become materially changed by the action of the defendant, in consequence of which the stream repeatedly overflowed upon plaintiff's premises. The physical character of the change was such that as between the parties and for the purposes of that case, at least, it had to be regarded as permanent and known to the plaintiff so to be. It was for that reason held he could not recover for loss of personal property replaced in his basement after having learned by experience that it would in all human probability suffer again from the same cause. Here, however, the defective condition of the sewer was not in its nature permanent. No one concerned could properly assume

that it would be suffered to remain an indefinite length of time. It was a case where the city was in duty bound to make necessary repairs to one of its public improvements. The deceased was entitled to rely upon the performance of that duty. When the sewer first became obstructed he certainly would not have been justified in assuming that the city would never repair it. It will hardly be contended that his only alternative then was to abandon an integral part of his plant and sue for the damages, for the sewer might have been put in order the next day. How long then must the duty of making repairs be neglected to justify such abandonment? By what means is it to be ascertained when the owner may do that and charge his loss to the city.

We are of opinion that in such case the owner's rights are correlative to the city's duty in the premises. That duty was neither terminated nor modified by persistent neglect to perform it, but was a continuing duty, and so long as it continued the owner's right continued to use his premises for the purpose to which he had devoted it. The city had such reasonable length of time as was necessary in which to make the repairs after notice of the obstruction, and any property stored on this lot during that time might have been at the owner's risk. Whether so or not we are not called upon and do not undertake to decide because there is no such question in the case. But we do hold the use made here was not at the decedent's risk and his estate is entitled to recover for loss occasioned by the injury complained of to personal property kept on.

So far as the exceptions go to the referee's conclusion on the subject of testator's negligence they are sustained. All other exceptions on both sides are overruled, and, justice requiring it, the report is sent back to the referee in order that he may ascertain from the evidence and assess the damages, if any excluded on the ground of contributory negligence.

An upper riparian owner is held, in *Monroe Mill Co. vs. Menzel* (Wash.) 70 L. R. A. 272, not to be entitled to make use of a navigable stream by storing the water and letting it down in floods for the purpose of flooding his timber to market. A note to this case reviews the other authorities on use of navigable stream.

In the Court of Common Pleas of Lackawanna County, No. 1340, September Term, 1902.

CASE STATED.

Jane B. Frink to the use of E. H. Shurtleff vs. The Aetna Life Insurance Company.

An insurance policy provided: "Any portion of the whole premium for the current year remaining unpaid, or any other indebtedness to this company on account of this policy, being first deducted therefrom."

The insured died January, 1901. The semi-annual premium was due February 21, 1901. Defendant deducted the semi-annual premium.

Held: That under the terms of the policy defendant had right to make the deduction.

Mr. E. H. Shurtleff, for plaintiff.

Messrs. Willard, Warren & Knapp, for defendant.

Opinion by Kelly, A. L. J., June 7, 1906.

The facts as disclosed in the case stated are that William Frink, on the 21st of August, 1874, procured a policy of insurance upon his life in the defendant company, payable after his death to his wife, Jane B. Frink; that the assured died in January, 1901; that shortly afterwards the company paid Mrs. Frink the amount of the policy less a semi-annual premium which would be due on the 21st of February, 1901; and that, denying the right of the company to deduct this premium, she assigned her claim for it to Mr. Shurtleff, who brought suit to recover it. The legal question is whether the company had the right to deduct the premium from the face value of the policy under the terms of contract.

Under the terms of this policy we think it had such right. It provides that in consideration of the semi-annual premium of forty-four dollars and sixty-five cents to be paid to the company on or before the 21st day of August and February in each and every year during the continuance of the policy for the term of life of the assured, that the company does insure the life of William Frink for the term of his natural life in the sum of two thousand dollars, to be paid to his wife, Jane B. Frink, her executors, &c., within ninety days after due notice and proof of the death of the said insured during the continuance of the policy; and then further provides as follows: "Any portion of the whole premium for the current year remaining unpaid, or any other indebtedness to this company on account of this policy, being first de-

ducted therefrom." This clause discloses that the contract, while for the life of the insured, was for a yearly premium, although payable semi-annually. Otherwise no force or effect whatever could be given to the words "the whole premium for the current year." While it is true that ambiguous language in a policy of insurance must be construed most strongly against the company which makes use of it, there is no ambiguity in this language.

As we understand the custom it is that all policies are calculated for the year beginning with the date of issue, and in nearly every policy we find some stipulation similar to the one under consideration. See Cooley's Briefs on the Law of Insurance, vol. 4, p. 3286; and *Albert, et ux. vs. Mutual Life Ins. Co.*, 27 Ins. L. J., 726. The case of *National Life Ass'n vs. Berkeley*, 97 Va., 571, cited by plaintiff's counsel, is not in conflict with this construction. In that case it was decided that in a plain, unambiguous policy of insurance which stipulated that in consideration of a stated bimonthly premium there should be paid to the beneficiary a given sum upon the death of the insured less any "indebtedness due the company," such "indebtedness" did not refer to unearned or unaccrued premiums. Here the stipulation is different. It specifically provides that "any portion of the whole premium for the current year remaining unpaid," as well as other indebtedness, shall be deducted from the amount of the insurance.

We, therefore, direct that judgment be entered in favor of the defendant.

A statute providing for the registration and protection of trademarks, which attempts to empower the party injured by a violation of the statute to fix, within limits prescribed, the amount of the penalty which, in addition to full compensation for the injury suffered, shall be exacted from the offender for the use and benefit of the injured party, is held in *Cigar Makers' International Union vs. Goldberg* (N. J. Err. & App.) 70 L. R. A. 156, to be unconstitutional.

To be entitled to a reward, it is held, in *Smith vs. Vernon County* (Mo.) 70 L. R. A. 59, that one must act with a knowledge of and in reliance on it.

In the Court of Common Pleas of Lackawanna County, No. 2, January Term, 1905.

RULE TO STRIKE OFF MUNICIPAL LIEN.

City of Carbondale vs. Patrick Campbell.

The Act of June 4, 1901, P. L. 364, does not require a bill of particulars and a mere general description of the kind of work is sufficient. The authority to amend at any time is conferred by Sec. 35 of the Act.

Mr. R. D. Stuart, City Solicitor, for plaintiff.

Mr. H. C. Butler, for defendant.

Opinion by Kelly, A. L. J., May 7, 1906.

This lien was filed by the city of Carbondale against the defendant's property by virtue of the provisions of the act of June 4, 1901, P. L. 364, and a city ordinance passed in pursuance of its provisions, to secure the payment of \$51.55, the cost of the construction of a sidewalk on South Park street; and it sets forth in the 6th paragraph: "The character of the work done for which this claim is filed was the construction of a sidewalk in said South Park street." The motion to strike off is based upon the sole ground that the lien does not set forth the kind and character of the work done and the materials furnished as required by the act.

In clause 7, sec. 11, of the act it is provided that "in other than tax claims the kind and character of the work done" must be set forth, and we are of the opinion that the lien does not come up to the requirements of the act in that respect. It does not state what kind of a sidewalk, whether constructed of brick, stone, concrete, wood or gravel, nor does it state that it was laid in front of the property of the defendant. However, the plaintiff asks leave to amend by filing a new lien which sets forth: "Sixth. The character of the work done for which this claim is filed, was the construction of a flagstone sidewalk in said South Park street in front of said Campbell's property according to bill attached and made a part hereof," and we find the bill referred to for laying 312½ square feet of stone sidewalk. This is a sufficient compliance with the requirements of the act and the amendment cures the defect complained of in the original lien. The act does not require a bill of particulars and a mere general description of the kind of work is sufficient. The authority to amend at any time is conferred by Sec. 35 of the act, and is a matter of right, saving intervening rights, and

excepting amendments after the time for filing has expired which undertakes to substitute an entirely different property from that originally described in the claim.

Now, May 7, 1906, leave is granted to plaintiff to file amended lien, and upon the filing of the same the rule is discharged.

In the Court of Common Pleas of Lackawanna County, No. 236, November Term, 1906.

SUR PETITION FOR MANDAMUS.

Commonwealth ex rel. etc. vs Robert W. Allen, Register of Wills.

Under Section 25, Act of 15th March, 1832, P. L. 142, relating to the probate of wills where objection is made or caveat filed, it is for the court to determine whether the request is proper and the matters in controversy disputable and difficult.

The remedy by mandamus is a matter of right when properly asked for. It is not properly asked for by one who has already, by his own act in taking an appeal, dispensed with all necessity and removed all occasion for issuing the writ.

Messrs. O'Brien, Martin & Fitzgerald, for plaintiff.

Mr. R. H. Holgate, for defendant.

Opinion by Newcomb, A. L. J., November 8, 1906.

This case comes before us on special demurrer to respondent's answer to an alternative writ to compel the register of wills to certify to the Orphans' Court contested proceedings pending before him on the probate of an alleged will. The writ was applied for under section 25, act of 15th March, 1832, P. L. 142, relating to the probate of wills where objection is made or caveat filed, and prescribing the conditions upon which the matters in controversy shall be referred by the register to the Orphans' Court for decision. In such case the section provides that, "Where any question of kindred or other disputable and difficult matter comes into controversy before any register he shall, at the request of any person interested, appoint a Register's Court for the decision thereof," etc., etc.

While the petition is not so definite and precise in all particulars as it might be, the respondent, by his answer, has taken defense on the merits. In certain particulars some of the averments of the answer are repugnant to each other, and for that, among other reasons, it is challenged by the demurrer. Enough appears, however, to show that

Gustave Brady died August 1st this year at Danmore, this county, the place of his domicile, seized of both real and personal estate; that on the 3rd of August the relators filed with the register of wills a caveat against the probate of any paper writing as the will of the deceased; on the same day Mrs. Jennie E. Brink, cousin of the deceased, with whom he had lived for some years up to the time of his death, presented for registry a paper purporting to be his last will, dated November 3, 1904, devising to her his entire estate and appointing her sole executrix; the caveators are nephews of the deceased. Whether they are his next of kin does not affirmatively appear, but their interest is neither denied nor called in question, and on both sides the arguments have assumed that the caveators are among the next of kin to the deceased. It further appears that a hearing was had before the register at which the testimony of several witnesses pro and con has been taken on various dates between August 26th and September 28th; that three questions have been in controversy, to wit, the due execution of the alleged will, the testamentary capacity of the testator, and undue influence on part of the devisee and others; further controversy arose over the admissibility of evidence which the register was called upon to decide; on September 28th the caveators presented to the register a request in writing as well for an issue to be directed to the Common Pleas as for the appointment of an Orphans' Court to try these several questions; the requests were not complied with and the register proceeded to hear further testimony on part of proponent in rebuttal, at the close of which October 1st was fixed as the time to hear arguments as to the validity of the will under the evidence before him; from that time to this he has held the case under consideration on the merits; in the meantime, on October 5th, by paper filed and order endorsed thereon by him, leave was granted to withdraw so much of the request as referred to an issue so that it should stand as a demand only for a certificate to the Orphans' Court.

It is clear that the proceedings developed a serious controversy as to the physical ability as well as the mental capacity of the deceased to make a will at the time of its date. While it is true that in the last paragraph of his answer the respondent says he has at no time refused to certify the proceeding "upon a proper request or upon any evidence sufficient to bring into the proceeding here or selsewhere 'a

difficult or disputable matter' of any nature whatever," the fact remains that he has not so certified the case, and we think it is for the court to determine whether the request was proper and the matters in controversy difficult and disputable. From what has already been stated it is safe to say disputable matters have arisen, and all judicial experience shows that no substantial controversy as to the physical ability and mental capacity of an alleged testator to make a will is free from difficulty. The nature and character of the evidence proper for consideration, the weight of the evidence, the qualification of witnesses to express an opinion, etc., etc., are all questions that can only be properly passed upon by a judge learned in the law. This case may be further complicated with questions of the burden of proof if it appear as is contended by the petitioner that the devisee stood in a relation of confidence to the deceased.

The statute prescribes no special formality as to the request for a certificate. It is believed to be sufficient in form if it fairly makes known to the register the nature and character of the controverted matters and the desire of the party that they be referred to the Orphans' Court. While it would be good practice in framing the request to state with somewhat more precision than is found here the specific questions arising out of the controversy to be tried by the Orphan's Court, yet the substance of the questions appear, and we think that is sufficient. The manifest purpose of the statute should not be sacrificed to any degree of formality not essential to a just and orderly administration of the law.

This brings us to the final question in the case. It is contended that the relator has a full and complete remedy at law by appeal from the register's decision if it should be adverse, and for that reason the remedy by mandamus will not lie. For this contention the learned counsel relies on what was said by the Supreme Court in *Com. ex rel. vs. Thomas*, 163, Pa., 446. True it is there said the writ cannot be successfully invoked unless there be a grievance which cannot otherwise be adequately remedied. This, in connection with the general rule also referred to there that "in all cases where full and ample remedy may be had either by appeal, writ of error or otherwise from the judgment, decree or order of the subordinate court, mandamus will not lie," is relied upon by the respondent as decisive against the writ in this instance. Such understanding of that case overlooks the important fact

that the proceeding there had gone to judgment, an appeal from the register's decision had been taken and in that way the whole controversy had been transferred to the Orphan's Court before application was made for the writ. The dispute resolved itself into a question as to which of two wills was valid. As it stood upon the record the nature of the case was such that if the appeal should be successfully prosecuted the will set up by the appellant would necessarily stand established. Keeping that fact in mind the force of what is said by the court can be appreciated. "On the facts here," says the court, "the writ was not one of right on the part of the relators. Their right to have it issued depended wholly on whether it was a necessary step to a proper adjudication of the dispute. If it accomplishes nothing of substance, aids not in the administration of justice, it is not a right. Writs of this nature are not issued to gratify the whims of suitors." And further, "As every question necessarily comes before the Orphans' Court on appeal, the appellees have a complete and adequate remedy to which this mandamus cannot, in the least, contribute." In other words, under the facts there the writ would only serve the purpose of getting the case in the Orphan's Court in duplicate. To say the least that would be a vain and empty formality. That is what the Court meant in saying "for that reason and that alone the decree is reversed."

Viewed in that light the decision is in harmony with the doctrine of the earlier cases of *Com. vs. Bunn*, 71 Pa., 405, and *Wickershane's Appeal*, 75 Pa., 334, with which it would be so flatly in conflict if the effect contended for by respondent be given it that they would stand virtually overruled. These cases hold that the act of 1832 leaves the register no discretion where the matter in controversy is plainly disputable. In *Com. vs. Bunn*, referring to section 25 of the act, the court said: "These are plain words and are imperative beyond a doubt in any of the contingencies mentioned in the section, that the register *shall* proceed no farther himself but call a Register's Court." This reaffirmed in *Wickershane's Appeal*, and is believed to be the settled construction of the statute which the court did not intend to disturb in *Com. vs. Thomas*. That construction amounts to this, that the remedy by mandamus is a matter of right when properly asked for. But *Com. vs. Thomas* holds that it is not properly asked for by one who has already

by his own act in taking an appeal dispensed with all necessity and removed all occasion for issuing the writ. That is a very different thing from the proposition that because the right of appeal exists and can eventually be resorted to if the decision be adverse, therefore, such right is exclusive of the remedy by mandamus. It was not the existence but the voluntary exercise of the right of appeal, in a case where it answered all purposes, that was held to be decisive against the relator. If the respondent's view of that decision should be accepted it would nullify an express statutory provision which by its unmistakable terms under certain conditions imposes a plain duty upon the register. We are not prepared to do that, and on the facts here such conditions appear. Seeing no reason for refusing the writ the demurrer is sustained and a peremptory writ awarded as prayed for.

That no trust is created by a conveyance of property to a religious society is held in *St. James' Parish vs. Bagley* (N. C.) 70 L. R. A. 160, notwithstanding a recital that it is for the purpose of aiding in the establishment of a home for indigent widows and orphans, or in the promotion of any other charitable or religious object, where no trust is expressed, and the habendum clause vests the property absolutely in the society.

Requiring payment of a license fee, under penalty, by a merchant who, having already paid the privilege tax upon his business, issues trading stamps in connection therewith, is held, in *Montgomery vs. Kelly* (Ala.) 70 L. R. A. 209, to be an attempt, under the guise of a license tax, to fix a penalty on him for conducting his business in a certain way, and to be unconstitutional and void.

Safety gates at the intersection of a railroad and a highway are held, in *Seibert vs. Missouri P. R. Co.* (Mo.) 70 L. R. A. 72, not to be a nuisance, although placed inside the curb, where sufficient space is left for travel, so as to come within the rule that a municipal corporation cannot authorize a nuisance in the highway.

In the Court of Common Pleas of Lackawanna County, No. 221, September Term, 1905.

RULE FOR A NEW TRIAL.

J. W. Guernsey vs. F. C. Pilger.

A contract in suit was under seal and contained a provision that "no verbal agreement will be recognized whatever." The defence was the denial of any contract. Defendant admitted the genuineness of his signature but asserted that it was obtained by a trick of the plaintiff's agent.

There was no question of varying or reforming the writing signed by the parties, or restraining its enforcement, but rather whether there was any contract between them. It was a defence seeking the cancellation not of a contract, but of a pretended contract. The case was purely a question of credibility and weight of the evidence with the burden on the defendant.

Messrs. Vosburg & Dawson, for plaintiff.

Messrs. O'Brien, Martin & Fitzgerald, for defendant.

Opinion by Newcomb, A. L. J., June, 1906.

Various reasons were assigned for new trial but at the argument all were abandoned except the second which charges error in the affirmation of plaintiff's third point, as follows: "That the contract in suit is under seal and contains a provision that 'no verbal agreement will be recognized in any way whatever.' It is presumed by the law that this paper contains all of the agreement of the parties, and even if the jury find that there was a separate verbal agreement made by E. W. Guernsey which differed in any way from the terms of the written agreement the written agreement must control under the evidence in this case, and no verbal agreement on the part of E. W. Guernsey made in connection with the signing of the written instrument would be sufficient in law to invalidate the contract in suit; so even if the jury find that there was some parol agreement differing from the terms of the written instrument, this alone would not constitute a defense, and if nothing more has been shown to the satisfaction of the jury the verdict must be for the plaintiff."

This was affirmed with some hesitation after counsel for defendant at the court's request had made such criticism of plaintiff's points as he saw fit without finding any fault with this one.

We think now our first impression was correct and the point should have been refused as inapplicable to the particular facts in controversy. Such instruction is appropriate where the defense is an effort either to

reform a writing on the ground that something not intended had been omitted from or added to it, or else to restrain the use of the writing as a fraudulent violation of a collateral agreement upon the faith of which its execution was procured. In both of those instances the making of a contract is not in dispute. The attempt to put the evidence of the contract in writing is not disputed. The dispute is either a question of terms and conditions intended to be incorporated in it, or of the right to use it in view of the collateral agreement. Both defenses necessarily presuppose the existence of a contract. In the present case while something was said during the trial about reforming the written instrument in suit it was in no proper sense a case of reformation of contract. The defense was a denial of any contract. True, the defendant admitted the genuineness of his signature to the paper which purported to be a piano lease binding him to pay the sum of \$275, but he denied making any such contract, and asserted that his signature was obtained by a trick of the plaintiff's agent, who requested permission to put the piano in his house temporarily for his own convenience after failing to induce him even to bargain, much less to enter into any agreement for it. If his story was true the agent took advantage of the fact that the defendant couldn't read, and procured his signature upon the assurance that it was a mere receipt or voucher by which he could account to his principal for the whereabouts of the piano, coupled with the assurance that he would call and take it away in a few days. This was what was affirmed on one side and squarely denied on the other. The real issue was thus sharply defined. There could be no misunderstanding by the jury nor anyone else as to the exact question upon which the case turned. There was no question of varying or reforming the writing signed by the parties, or restraining its enforcement, but rather whether there was any contract between them. It was a defense seeking the cancellation not of a contract, but of a pretended contract. If there were a contract at all it was the contract evidenced by the lease. If the evidence of the defendant was believed there never was a contract, and the jury were distinctly instructed to that effect.

While the case didn't call for the instruction complained of we are convinced that it did the defendant no harm. Under some circumstances it might have tended to confuse the minds of the jurors. Under the evidence and general charge in this case there is no ground for

the belief that it had any such tendency. The case was purely a question of the credibility and weight of the evidence with the burden on the defendant. The jury were not convinced that he told the truth. The evidence amply warranted the finding and we see no reason to disturb their verdict.

The rule for new trial is discharged.

In the Court of Common Pleas of Lackawanna County, No. 710, May Term, 1906.

EXCEPTIONS TO SUPPLEMENTAL AFFIDAVIT OF DEFENCE AND RULE FOR JUDGMENT.

Yellow Cliff Land Improvement Co. vs. Peck Lumber Manufacturing Co.

An affidavit of defence was found to be objectionable because of vagueness and uncertainty and as failing to show that any damages had accrued to defendant prior to the commencement of the suit. A supplemental affidavit was filed and in it set-off was taken as the defence.

Held: When defence is taken on the ground of set-off the defendant, in a sense, assumes the affirmative of the issue. It was only fair to the plaintiff that the affidavit of defence in such cases should be tested by the same rules that would apply to his declaration if he were suing for the damages in question and the sufficiency of the declaration were challenged by demurrer.

Mr. T. F. Wells, for plaintiff.

Messrs. Patterson & Rymer, for defendant.

Opinion by Newcomb, A. L. J., November 6, 1906.

By opinion filed August 13th, we directed judgment unless a sufficient affidavit were filed within one week, to meet defects in the former affidavit in this case. That was believed to be defective in two particulars. The plaintiff's claim was admitted to be correct, but recovery was sought to be prevented by a plea of set-off, growing out of an alleged breach by plaintiff of its contract with defendant in an independent transaction, for which the latter asked damages in excess of the claim. We held the affidavit to be objectionable. First, as vague and uncertain in respect to the alleged breach; and, second, as failing to show that any damages had accrued to defendant prior to the commencement of the suit

Time was given to file a sufficient affidavit, because the one then under consideration seemed to suggest the existence of a set-off. But it appeared to us, and was so stated, that if so the defendant ought to be able to set it forth in unmistakable terms. In pursuance of that order the supplemental affidavit was filed, and the question now is whether it supplies the defects for which the other was adjudged insufficient.

In taking defense on the ground of set-off the defendant in a sense assumes the affirmative of the issue. It is only fair to the plaintiff that the affidavit of defense in such case should be tested by the same rules that would apply to his declaration if he were suing for the damages in question and the sufficiency of his declaration were challenged by demurrer. Treating the exceptions here as a demurrer to defendant's statement, the question resolves itself into this, does the affidavit make out a prima facie case for damages so that the court could enter judgment and liquidate the amount if issue were formally joined thereon at suit of the defendant? We think not.

The contract, the breach of which gives rise to the claim, was formed by the oral acceptance of a written order, dated October 10, 1905, for seven carloads and of 1,400 specific pieces of hemlock lumber. The terms of acceptance were for reasonably prompt delivery at the different points mentioned in the order, for it was in these words, "We will get this lumber out for you right away." As to what would have been a reasonable time for delivery in no way appears. There is nothing to show where the plaintiff company, its mills, if any, or other sources of supply were located; nothing to show by the understanding of the parties, course of dealing, experience, custom of business, or other circumstances, what would be a reasonable time for delivery of any or all of the parcels. Neither is there any averment as to what would be such reasonable time. It is essential that something appear as to that in order to determine when the breach took place. The damages are to be measured primarily by the market value of the lumber somewhere near the date when it was to be delivered.

This serves to call attention to what seems to be the fatal practical defect of the defendant's case as presented.

It has been assumed by the company that its damages are to be tested by the market value on May 1st, this year. That might imply

that in its opinion the breach occurred shortly before that date. But a material element of its case is not to be left to such implication. But it might imply something else. There is an ambiguous averment that in consequence of the plaintiff's breach the defendant on that day was compelled to buy hemlock to supply that which plaintiff had failed to deliver. Whether its meaning is that the lumber was in fact supplied in that way and at that time is not made entirely clear. But assuming that is what is meant it cannot be said that the price paid is shown. The averment is that "an advance price" was paid. Then follow schedules showing the contract price to be paid the plaintiff in one column and in another column, not the price alleged to have been paid by defendant, but the "market value."

Now let it be assumed in favor of the defendant that the breach occurred near enough to May 1st so that the market value on that day is drawn in question, it could do either one of two things. It could go without lumber and sue for the difference between the contract price and the market value, if there were a market—and it would so appear by this affidavit—or it could buy the lumber in the market, and sue for the loss, if any, actually realized by reason of paying an advance price. There is nothing in this affidavit to show that defendant paid the market value. To say that it paid "an advance price" and follow that with a schedule showing the "market value" on that day is not the equivalent of an averment of such what was paid. If the defendant bought any lumber at that time to take the place of that in suit, it well knows what was paid for it and it would be just as easy to set forth the figures as it is to specify the contract price. The defendant can recover no more than his actual damages. If he bought lumber elsewhere and paid no more than the market value he can set off the difference whatever it may be. But what that was we cannot say from an examination of the papers. Putting the most favorable construction on the affidavit the most we can say is:

First—On or just before May 1st there was a breach of plaintiff's contract in another transaction for the delivery of lumber.

Second—On that day defendant bought in the open market other lumber to supply that for which plaintiff was in default.

Third—That the market value of the lumber was then a certain

figure in excess of the price at which plaintiff had contracted to deliver it.

Fourth—The price paid by defendant on May 1st is undisclosed.

The law applicable to these facts is believed to be that the difference between the contract price and the market value at the time of the breach is the limit to which defendant can go in its claim for damages in any event; and having in fact supplied itself with lumber as claimed, the difference in price actually paid, not exceeding that limit, is the measure of its damages; and further, in order to prevent judgment in such case by an affidavit of set-off exceeding plaintiff's claim, without other defense, it is incumbent on the defendant to set forth explicitly the price paid.

For further discussion of the principles believed to apply to this case reference is made to

Haskell vs. Hunter, 23 Mich., 305.

Wehle vs. Haviland, 69 N. Y., 448.

Arnold vs. Blabon, 147 Pa., 372.

Theiss vs. Weiss, 166 Pa., 9.

The exceptions are sustained and the rule for judgment is made absolute.

*In the Court of Common Pleas of Lackawanna County, No. 351.
March Term, 1905.*

TRESPASS.

RULE FOR A NEW TRIAL.

Helen M. Fuller vs. Uriah Cole.

"Margain of the lake" is a term of unequivocal import, meaning the line where the earth and water meet around the lake. By the use of these words riparian owners declare their intention to make, not the middle, but another part of the lake—the edge of the water—the boundary line.

Messrs. Willard, Warren & Knapp, for plaintiff.

Messrs. J. W. Carpenter, Agib Ricketts and Fred. C. Hanyen, for defendants.

Opinion by Edwards, P. J., August 13, 1906.

Counsel for both parties asked for binding instructions in this case. After hearing arguments on both sides we instructed the jury to return

a verdict in favor of the plaintiff and to assess the damages at a nominal sum. A verdict for six cents was rendered.

On a review of the whole record we can find no sufficient reason to change our mind.

1. The purpose of the action is to establish plaintiff's title to Lily Lake, or Wall Pond. We held that the plaintiff had proven a record title to at least nine-tenths of the lake, there being outstanding in somebody else a life interest in an undivided one-tenth. The deed to the plaintiff for this interest was offered in evidence; but, being subsequent to the date of the trespass and to the time the suit was begun, it was rejected. The fact of the outstanding interest is of little moment and can be of no avail to the defendant in this case. The record title from the commonwealth down is voluminous and somewhat complicated. Nevertheless, the plaintiff, in our judgment, the question being for the court, has made a good paper title.

2. The defendant owns land bordering on the lake and he defends partly on the ground that he is a riparian owner and that his land extends to the middle of the lake. This claim is clearly untenable. Defendant's land is described by metes and bounds, two of the courses running as follows: "Thence, south 44 degrees west 79 perches and 5-10 of a perch to a corner in the edge of Wall Pond (Lily Lake); thence along the edge of said pond * * * 31 perches to a corner in the edge of said pond." These are his lines. His land comes to a corner in the edge of the lake, thence along the edge of the lake 31 perches, and thence away from the lake. On what authority does the defendant claim that he owns to the center of the pond? The question is settled in Pennsylvania and we refer only to *Baylor vs. Decker*, 133 Pa., 168, and *Smaulters vs. Boyd*, 209 Pa., 146. There are other cases on the same point. We think the doctrine is well stated in *Lembeck vs. Nye*, Supreme Court of Ohio, reported in 21 American State Reports, on page 834, in the following words: "'Margin of the lake' is a term of unequivocal import, meaning the line where the earth and water meet around the lake; by the use of these words the parties have declared their intention to make, not the middle, but another part, of the lake—the edge of the water—the boundary line. No other construction can be given to the words the parties themselves have chosen, without doing violence to the meaning; and an intention contrary to the one

expressed by the very words selected by the parties themselves cannot be presumed." This contention of the defendant, therefore, falls in the face of indisputable authority:

3. Defendant also claims the right by prescription to cut the ice on the lake. What are the undisputed facts as testified to by the defendant and his witnesses? He and several other persons who own land bordering on the lake, as well as many persons who are not owners of land near the lake, have periodically for more than twenty-one years fished in the waters of the lake and have boats thereon, and have cut ice and have drawn logs over the lake in winter. This they have done all over the lake: not within any particular lines or in the exercise of any alleged riparian rights, but indiscriminately, in common with others and without regard to the location of particular lands on the shore. Even the trespass complained of in this case was committed by the defendant at a point opposite somebody else's land. Can title by prescription be acquired in this way? We went over this same question in relation to fishing in the case of *Gibbs vs. Sweet*, 7 Lackawanna Legal News, 18, and we here refer to the cases therein cited as well as to the opinion of the Superior Court in the same case. The defendant, therefore, having no right to cut ice as a riparian owner, and not having acquired such right by prescription, his whole defense falls. And having held that the plaintiff had proven title to Lily Lake, there was nothing left for the jury to do except to assess the damages, which they did at six cents.

We find nothing else in the case or in the reasons for a new trial requiring further discussion.

Now, August 13, 1906, the rule for a new trial is discharged and a new trial is refused. We note an exception for the defendant.

A wharf owner is held, in *The Davidson* (U. S. D. C. R. I.) 70 L. R. A. 193, to have no right to exact wharfage from a vessel which, lying in the public navigable stream at an adjoining wharf, merely overlaps his wharf at a time when he has no actual need to wharfage are collated in a note to this to use it. The other cases on the right to case.

In the Court of Common Pleas of Lackawanna County, No. 61, May Term, 1906.

Quo Warranto.

DEMURRER TO RESPONDENT'S ANSWER.

Commonwealth ex. rel. W. R. Lewis, District Attorney, vs. William Saunders.

When the duration of a term of office is fixed by law it answers no purpose to specify the term on the ballot. It is only when, in the same ward, borough or district, as the case might be, and at the same election, candidates are to be elected for the different terms, as councilmen, is it necessary to specify the various terms on the ballot.

Messrs. Vosburg & Dawson, for relator.

Mr. R. J. Manning, for respondent

Opinion by Edwards, P. J.

The following are the facts established by the pleadings and agreement of counsel in this case:

1. The borough of Moosic is divided into four wards, each ward being entitled to elect two councilmen.

2. At the municipal election held in said borough last February two councilmen were to be elected in the Third ward, to succeed two other councilmen whose terms were about to expire. The term for which each of the councilman was to be elected was two years as fixed by law.

3. In the Third ward of said borough at said election four persons were candidates for councilman and the vote for the four was as follows:

William L. Anthony	103 votes
Charles Broadhead	78 votes
W. N. Ellis	70 votes
William Sanderson	41 votes

4. On the Anthony and Broadhead ballots there was no term of years specified; the Ellis ballots specified a term of "one year" and the Sanderson ballots a term of "two years."

CONCLUSIONS OF LAW.

1. The borough of Moosic having an even number of councilmen not dividable by three is subject to the provisions of the third section of the Act of June 1, 1883, P. L. 54, which reads as follows:

"That it shall be lawful for the qualified voters of the boroughs in the Commonwealth of Pennsylvania, which have an even number of councilmen not dividable by three, and which do not now enjoy the right by special statutes, at the first election for borough officers next ensuing the passage of this Act, to elect one-half the whole number of councilmen for one year, one-half for two years, and annually thereafter to elect one-half of the whole number for two years: Provided, that at the first election for borough officers, held after the passage of this act, the voters shall put on their ballots the names of those who are to be elected for the different terms."

2. When a councilman is elected for a regular term fixed by law it is not necessary to specify the term on the ballot.

3. The fact that a term of two years was specified on the Sanderson ballots has no legal significance and gives no superior advantage to Sanderson.

4. In addition to the fact that Ellis had the least number of votes, it seems that the ballots cast for him having been marked for "one year," he is doubly disqualified from holding the office of councilman.

5. William L. Anthony and Charles Boardhead are the legally elected councilmen of the Third ward of Moosic borough and are entitled to the offices.

6. A judgment of ouster should be entered against William Sanderson and against W. N. Ellis.

DISCUSSION

While there are two separate cases before us the answer in one is a duplicate of the answer in the other case. For this reason the opinion is written in the Sanderson case, No. 61, May Term, 1906, and the merits of both cases are herein considered.

The question of law involved is so clear that any extended discussion is unnecessary. The Act of Assembly fixes the term of a councilman of Moosic borough at two years, and when the duration of a term of office is fixed by law it answers no purpose to specify the terms

on the ballo . As well might the ballot for a judge specify "for ten years" or the ballots for county offices specify "for three years." It is only when, in the same ward, borough or district, as the case might be, and at the same election, candidates are to be elected for different terms, as councilmen, is it necessary to specify the various terms on the ballots. If, for instance, in a borough or in a ward, councilmen are to be elected for one, two and three years, it is essential that each ballot should specify the term voted for. This, in effect, is the doctrine laid down in *Com. vs. Fletcher*, 160 Pa., 456. The term of every councilman in Moosic borough is two years; hence, designations on ballots specifying the duration of terms of office for councilmen are superfluous.

We, therefore, give judgment for the relator upon the demurrer with costs, and we adjudge that William Sanderson is guilty of usurping or intruding into and unlawfully holding and exercising the office of councilman of the Third ward of the Borough of Moosic, and it is further adjudged that the said William Sanderson be ousted and altogether excluded from said office.

A surety company having charter power to finance other companies, and having actively undertaken to do so with respect to a particular one in whose success it is largely interested, is held, in *First Nat. Bank vs. Guardian Trust Co.* (Mo.) 70 L. R. A. 79, to have no right to plead *ultra vires* in defense of its liability as surety on a note executed to obtain necessary funds for it, where the payee parted with his money under the belief that the trust company, in placing its name on the note, was pursuing its known policy with respect to the maker thereof.

A railroad company which finds a drunken trespasser, who has to its knowledge recently, after being aroused from a drunken stupor, left the train of another company at its station, asleep in its switch yard, is held, in *Cincinnati, N. O. & T. P. R. Co. vs. Marrs' Admx.* (Ky.) 70 L. R. A. 291, to be bound either to see him safely out of the yard, or to exercise at least ordinary care to avoid injuring him in moving the switch engine about, where, under the circumstances, it is reasonable to anticipate his presence.

*In the Court of Common Pleas of Lackawanna County, No. 559,
March Term, 1904.*

RULE FOR A NEW TRIAL.

W. B. Rogers vs. C. H. Schadt and Adolph Marcus.

Upon a dissolution of an attachment under the Act of March 17, 1869, P. L. 9, and its supplements, the sheriff is bound to restore the goods to the owner unless prevented by the intervention of some cause over which he could have no control.

An action of trespass was brought against the sheriff and an attaching creditor. There was a verdict against the defendants jointly, showing that the attaching creditor was found to have participated in the acts of the sheriff.

The grounds of defence was the alleged fraudulent character of the sale under which the plaintiff claimed title from the defendant in the attachment.

In the judgment of the court the attaching creditor failed to impeach that transaction.

Held: That the measure of damages was the value of the goods of which the evidence showed the plaintiff to be deprived.

Messrs. Harding, Mumford & Zimmerman, for plaintiff.

Messrs. O'Brien, Martin & Fitzgerald, for sheriff.

Mr. John F. Scragg, for attaching creditor.

Opinion by Newcomb, A. L. J.

This is an action of trespass growing out of an attachment under the Act of March 17, 1869, P. L. 9, and its supplements. The defendants are the sheriff and the attaching creditor. The writ went out against one O. R. Rogers, a brother of the plaintiff here. It was issued July 2, 1903, returnable to September term following, for the purpose of seizing a stock of merchandise in a store at Moosic where O. R. Rogers had for some three years been in business. On that date the sheriff made a paper service of the writ, and finding W. B. Rogers in possession summoned him as garnishee, and not finding the defendant returned the writ as to him "nihil habet." July 6th the sheriff closed the store, locked it, and put it in charge of a watchman by whom he kept possession of the property until July 24th, when, with his permission and in his presence, the goods, or most of them, were sold at public sale by a constable. The sale was made on an execution upon a judgment recovered against O. R. Rogers July 30th before an alderman

at the suit of another creditor. In order that a levy might be made for this purpose the sheriff caused the store to be opened for the constable July 18th. Out of the proceeds of the sale the sheriff received from the hands of the constable enough money to cover his writ, costs and expenses, including \$54 paid for services of the watchman. Later, at the instance of the defendant in that proceeding and after hearing on the merits, the lien of the attachment was dissolved. The point at issue there was a *bona fides* of a transfer of the property by O. R. to William B. Rogers, claimed to have been made June 27th. In the judgment of the court the attaching creditor failed to impeach that transaction. The plaintiff's case here was founded upon title acquired by that transfer, coupled with notice to the defendants prior to his exclusion from the store.

There was no dispute about the plaintiff being found in possession of the property and claiming it as his own when the sheriff went there July 2. (See sheriff's return, p. 68, and testimony of Deputy Sheriff Gaffney, pp. 88 and 89, transcript).

As to the other defendant the evidence, if believed by the jury, was sufficient to warrant the finding that after service of the writ on this plaintiff as garnishee but before anything had been done to exclude him from possession of the goods, he had definite notice of the plaintiff's claim when the parties were together at the sheriff's office; that on that occasion he assured the plaintiff of his intention to close the store unless his claim, together with one which he held by assignment, was paid in full with costs; that he was present as a bidder at the constable's sale, and accepted the benefit of it to the extent that its proceeds were applied to the payment of costs incurred on his writ, amounting to \$68 for which he was liable. These facts, if found, we held sufficient to warrant the inference that he participated in the trespass, if any there were, of the sheriff. We held that the sheriff was bound upon the dissolution of his lien to restore the goods to the owner unless prevented by the intervention of some cause over which he could have no control; and that if in the meantime he voluntarily and without the co-operation of the other defendant suffered them to be disposed of by the constable the liability for their value would be that of the sheriff alone. In the ab-

stract the duty of the sheriff in the event that his lien is dissolved is to restore the property to the possession of the person from whom he took it, but in this case it is a matter of no moment that we said 'owner' instead of the party in possession. The plaintiff was the party from whose possession the goods were taken, but in order to recover he had to show that he was the owner. There was a verdict against the defendants jointly showing that Marcus was found to have participated in the acts of the sheriff. His conduct was entirely consistent with that conclusion. It was such as implied his knowledge of the fact that the constable had been permitted to take the property in execution, for he was present at the time and place of sale. He participated in it as a bidder, and thereby aided and abetted it. This was th uncontradicted evidence, and coupled with his alleged declaration at the sheriff's office before the store was closed—also uncontradicted—and with his sharing in the proceeds of the sale, and in the absence of any evidence to the contrary, leaves no doubt in our minds that it was for the jury to say whether there was any concert of action between the defendants in and about the seizure and subsequent disposition of the goods, whereby the plaintiff, if the owner, lost them. If the attaching creditor discountenanced the proceeding in any way he did not say so at the trial.

We see no error in submitting the question of joint liability to the jury, and this disposes of the only reason urged for new trial on behalf of Marcus.

As to the merits: The ground of defense was the alleged fraudulent character of the sale under which the plaintiff claimed title from the defendant in the attachment. At the outset we were inclined to adopt the plaintiff's theory that the action of the court in dissolving the lien of that writ was conclusive on that question. Further consideration convinced us that this theory was untenable and the case went to the jury at large under instructions which upon review appear to have been adequate. The verdict establishes the following facts:

1. The plaintiff took title to the goods in question by bill of sale June 27, 1903, in good faith for a valuable and fairly adequate consideration, without collusion with his brother in any intent to hinder, delay or defraud the brother's creditors.

2. Transfer of possession accompanied the sale; and

3. The sheriff acted in the premises at the suggestion and instance of his co-defendant after both had notice of plaintiff's claim of title.

These are the essentials of a case for trespass against both defendants and leave for consideration only the question of damages. The jury were instructed, as we think clearly, that the measure of damages was the value of the goods of which the evidence showed the plaintiff to have been deprived. It is now contended that we erred in commenting on the figures at which Mr. Marcus estimated the stock. An examination of the testimony shows that in referring to his testimony we had in mind the figures mentioned by Mr. Whitehead, one of his witnesses. This, of course, was a mistake, but indeed we fail to see how it is sufficient to call for a retrial of the case. It was the privilege as well as the duty of counsel to call our attention to the error at the time, and we can only account for his failure to do so upon the assumption that it passed unnoticed, a thing that would not be likely to happen where the confusing of one witness' testimony with that of another is at all calculated to do any harm.

The verdict shows that the jury assessed the value of the goods at about \$1,800, to which they added an amount equivalent to the legal rate of interest. Under the evidence we cannot say the damages at that figure are excessive.

On a careful review of the whole case it is believed to have been fully tried and fairly submitted. To grant another trial would be only to allow another experiment with it. That we cannot do. The rule for new trial is, therefore, discharged.

A railroad company which permits the use upon its road of a car the coupler of which is so defective that it cannot be prepared for use without going between the drawbars of the cars, and without the use of both hands, the exertion of considerable strength, and the consumption of more than the usual time, is held, in *Chicago, M. & St. P. R. Co. vs. Voelker* (C. C. App. 8th C.) 70 L. R. A. 264, to be guilty of actionable negligence, under a statute making it unlawful to permit the use of cars which cannot be coupled automatically by impact, without the necessity of going between the ends of the cars.

In the Court of Common Pleas of Lackawanna County, No. 1202, September Term, 1905.

EXCEPTIONS TO REPORT OF VIEWERS.

In Re: Paving and Grading Capouse Avenue in the City of Scranton.

The Act of 1889 which gives abutting property owners sixty days after the passage of the ordinance authorizing the laying of the pavement in which to make a choice of the kind of pavement to be laid is supplied by the provisions of the Act of 23d May, 1895, P. L. 105, as amended by the Act of 25th of April, 1903, P. L. 301, which applies to all cities and so of course to cities of the second class.

The provisions of the Act of 1895, as amended by the Act of 1903, require the advertisement of an ordinance. The omission of such advertisement is fatal to the validity of the ordinance.

Mr. D. J. Davis, City Solicitor, for plaintiff.

Mr. C. B. Gardner, for exceptants.

Opinion by Kelly, A. L. J.

The first and third exceptions raise questions of fact not appearing in the record, and as there have been no evidence offered to sustain them they must be dismissed. The fifth is too general to require any notice or discussion, so we need give attention only to the second and fourth.

The second is that the ordinance authorizing the improvement and upon which the proceedings were instituted was not based upon a petition of the property owners abutting on the line of the improvement and that no opportunity had been given them to express their choice as to the kind of a pavement to be laid. The exceptant bases this exception upon the provision found in Art. 5, Sec. 3, cl. 10, of the Act of May 23, 1889, P. L. 277, relating to third class cities. At the time the ordinance in question was passed Scranton was a city of the second class and the laws relating to third class cities were not applicable to it. Third class city laws do not apply to second class cities, generally speaking, and it can only be argued that the clause of the Act of 1889 referred to applies to the city of Scranton by virtue of Art. 20, of the Act of March 7, 1901, P. L. 20, which provides that, "All laws relating to cities of the third class shall continue to apply to cities of the second class which have passed or may pass into a city of the second class by reason of an increase of population, except so far as such laws are sup-

plied by or in conflict with laws relating to cities of the second class." We think the clause of the Act of 1889 which gives the abutting property owners sixty days after the passage of the ordinance authorizing the laying of the pavement in which to make choice of the kind of pavement to be laid is supplied by the provisions of the Act of 22d May, 1895, P. L. 105, as amended by the Act of 25th April, 1903, P. L. 301, which applies to all cities and so of course to cities of the second class. This Act provides in Sec. 1, "That all cities in this Commonwealth shall have power, without petition of property owners, to grade, pave, curb, macadamize, and otherwise improve any public street or public alley, or part thereof, within their corporate limits: Provided, the ordinance or ordinances authorizing and directing such improvement shall be adopted and enacted by the affirmative vote of three-fourths of the members-elect composing the councils of the cities, and shall be approved by the Mayor or City Recorder thereof. No such ordinance shall be finally adopted and enacted in a less period than thirty (30) days from the date of its introduction, and in the meantime copies of said ordinance shall be published in each of the official newspapers of such cities, once a week for three consecutive weeks, immediately following the introduction thereof, and in the event such cities shall have no official newspapers, then in at least two weekly newspapers, published in the county in which the cities are situate, once a week for three consecutive weeks." Under its provisions the property owners are not given the right to select the kind of pavement.

The question as to the construction of Art. 20, of the Act of 1901, was before this court very recently in the case of *City of Scranton vs. M. C. Ansley, et al.*, No. 337, September Term, 1904, in which case Judge Newcomb wrote an opinion reported in VII Lacka. Jurist, 329, containing a full and complete discussion of the question. In it he stated, *inter alia*, "It is believed that its purpose was to provide for resort to the former charter only in case of necessity, in order to maintain regular and stable government without risk of derangement or interruption by reason of the transition from one class to the other, and not to continue in force any third class city legislation, where, under the new charter or by general laws, the city is clothed with sufficient authority to act in the premises. For, viewed as a grant of power, the exception takes out of the grant two descriptions of laws enacted for the

government of cities of the third class: (1) Those conflicting with, and, (2) Those the function of which is adequately supplied by other laws applicable to cities of the second class." We could not with any profit add anything to Judge Newcomb's discussion, and upon the authority of that case and the reasoning of the opinion we conclude that the clause of the Act of 1889 in question does not apply to cities of the second class. The second exception is, therefore, dismissed.

We think, however, that the fourth must be sustained. While it does not appear of record that the ordinance was not advertised as required by the provisions of the Act of 1895, as amended by the Act of 1903, already quoted, yet it was admitted at bar by the counsel for the city that no advertisement of the ordinance was made.

The omission of the advertisement is fatal to the validity of the ordinance. The Act gave to all cities power to pave, etc., without petition of property owners, only on certain conditions, viz.: (1) The ordinance shall be enacted by the affirmative votes of three-fourths of the members of councils and approved by the Mayor; (2) the ordinance shall not be finally adopted within a less period than thirty days from the date of its introduction; and (3) copies of it must be published in each of the official newspapers of the city once a week for three consecutive weeks immediately following its introduction, and in case the city has no official newspapers then in at least two weekly newspapers published in the county where such city is situate, once a week for three consecutive weeks. The purpose of imposing these conditions upon the power of cities to make such improvements is clearly apparent. The property owners are the persons most directly interested, and the Act recognizes, therefore, the property of giving them ample notice that legislation in the city councils which affects them financially is pending. It requires at least thirty days shall elapse between the introduction and the passage of the ordinance so that no undue haste shall be used; and it requires publication so that such legislation shall not pass without the knowledge of those not interested. The act contemplates that the property owners may have ample notice and ample time to be heard before the city councils if they have objections to offer to the passage of the ordinance. It might well be in a given case that the property owners' protest might have the effect of preventing its passage. To say that the provision of the act requiring publication is merely directory

and not mandatory would defeat the plain intention with which it was inserted. It could with just as much reason be argued that the provision requiring thirty days to elapse before final passage is merely directory, which would be in conflict with all of the law upon the subject of legislative requirements with reference to the passage of municipal ordinances. It is a principle of construction that the legislative purpose must be always kept in mind, and if that purpose would be defeated if the provisions of the statute did not imply a prohibition to do the thing in any other way, there can be no question of the mandatory character of the statute: 26 Am. & Eng. Ency. of Law, 688. This statute confers certain powers upon cities in the Commonwealth, and, therefore, another rule of construction leads to the same result, viz.: the principle that when a statute confers a power, privilege or immunity, the formalities or conditions which it prescribes for its acquisition are mandatory and imperative, in the sense that non-observance of any of them is fatal to the benefit sought: Ibid, 691.

The case of *Erie City vs. Willis*, 26 Pa., 459, cited by counsel for the city, is not authority to the contrary. The learned President Judge of the Supreme Court, who wrote the opinion in that case, stated that what he had to say in discussing the question there involved was to be understood as relating only to an assessment by the civil engineer whose simple duty was to apportion the cost of a sewer by the foot front rule which would be a mere mathematical calculation. In that case the principle applicable was the one we find laid down by Mr. Justice Clark in *Pittsburg vs. Coursen*, 74 Pa., 400, that "A statute directing the mode of procedure by a public officer is in general deemed directory." But in this case, as we have already said, we have a statute conferring a certain power to be exercised in a certain manner, which is not to be interpreted by the same rule.

This disposes of the questions raised by the exceptions, and we desire to take this opportunity to suggest that the petitions for viewers in the case were not in proper form. We recommend that hereafter petitions of this character shall set forth affirmatively not only the passage of the ordinance with a copy of it attached together with a map of the improvement showing the properties to be affected, but also setting forth the fact of the passage of the ordinances by a three-fourths vote of

councils, its approval by the Mayor, that it was advertised as required, with proofs of publication.

The fourth exception is sustained and the proceedings are all set aside.

Powers of sale and of substitution of trustee in a mortgage or deed of trust are held, in *Frank vs. Colonial & U. S. Mortgage Co.* (Miss.) 70 L. R. A. 135, to be coupled with an interest, so that they are not revoked by the death of the grantor. The question, Does power of sale in a mortgage or deed of trust confer an interest which prevents its revocation by death of the mortgagor? is the subject of a note to this case.

A mine odner is held, in *Beresford vs. American Coal Co.* (Iowa) 70 L. R. A. 256, to be liable for the act of his superintendent, who has general command of the operation of the mine, in sending the engineer away from the engine operating the cage hoist, and attempting to operate it himself, knowing that he is incompetent to do so, by reason of which employees ascending the shaft are injured.

Neither a legal transfer of, nor a lien upon, the proceeds of milk to be delivered by a producer to a cheese manufacturer is held, in *O'Neil Helmke* (Wis.) 70 L. R. A. 338, to be effected by an order directing the latter to deliver to a third person the proceeds of all milk which the producer shall deliver at the factory in the future, where no contract exists requiring the delivery of any milk.

The interest given general creditors of an insolvent estate by statutes providing for its distribution is held, in *Blackman vs. Baxter* (Iowa) 70 L. R. A. 250, to be sufficient to entitle them, through the administrator, to attack a chattel mortgage thereon not recorded before the death of the mortgagor, under a statute providing that no mortgage of personal property, where the mortgagor retained actual possession thereof, is valid against existing creditors, unless recorded.

In the Orphans' Court of Columbia County, No. 17, December Term, 1901.

RULE TO SHOW CAUSE WHY ACCOUNT AND AUDITOR'S REPORT SHOULD NOT BE REVIEWED.

In Re: The Estate of Billington Ruckle, Deceased.

There are but two cases in which a review, under section 1, of the Act of October 13, 1840, P. L. (1841) 1, of an account settled and confirmed in the Orphans' Court, can be claimed as a matter of right: 1. For error of law, apparent on the face of tatter which has arisen since the decree. of matters of fact. 2. For new matter which has arisen since tre decree.

As a matter of grace, a review may be granted for new proof which has come to light since the decree was made, and which could not have been used at the original hearing of the cause.

A petition for review must allege that the balance found due by the decree sought to be reviewed, has not been paid and discharged by the accountant.

Messrs. Robert Howell and C. A. Small, for petitioners.

Mr. A. W. Duy, for respondent.

Opiaion by Sando, President Judge of the Orphans' Court of the Forty-fifth Judicial District, Specially Presiding, September 25, 1906.

This proceeding is under Section 1, of the Act of October 13, 1840, P. L. (1841) 1, which provides for petitions of review, and gives the judges of the Orphans' Court power to open decrees of confirmation and to re-examine the accounts of executors, administrators and guardians. But the proviso to that Act expressly states that its provisions shall not extend to any case where the balance found due shall have been actually paid and discharged. As distribution had been made by the administrator to the distributees entitled under the Auditor's report, it is quite clear, if we are governed by the statute, that this court has no jurisdiction to entertain the petition filed by Martha J. Kressler.

The decedent Billington Ruckle, the illegitimate son of Martha Creveling, deceased, died on or about the 11th day of April, 1900, intestate, and without leaving to survive him any wife, child, or mother. Upon information of Clinton Herring, Esq., that there was an escheat of the decedent's estate to the Commonwealth of Pennsylvania, the Auditor General appointed H. A. McKillip, Esq., escheator, who was also the administrator of the estate.

The administrator filed his first and final account on September 13, 1900, the same being confirmed nisi on December 3, and on December 5, 1900, exceptions were filed thereto by the attorneys for Martha J. Kressler, the present petitioner. On November 7, 1901, an agreement was reached, whereby the exceptions were withdrawn and an Auditor appointed to distribute the balance to and among the parties interested. This was done with the approval of the Auditor General who abandoned the claim of the Commonwealth for the purpose of saving further litigation.

The learned auditor in his conclusions of law held that all the claims enumerated in his findings of fact, under all the circumstances, were just, reasonable and proper charges against the estate and that the costs of the audit with the claims should first be paid out of the fund for distribution; and further that the decedent having died intestate, without heirs or known kindred or surviving widow, that under the laws of the Commonwealth there was an escheat, but, that the funds in the hands of the administrator being exhausted there was nothing remaining to distribute to the escheator. The auditor's report was filed December 2, 1901, and the same day the report was confirmed nisi, and on December 7, 1901, the report was confirmed absolutely. Whereupon the administrator paid out and distributed the fund, as appears by the receipts taken and entered of record upon the auditor's report.

On May 16, 1906, nearly five years later, Martha J. Kressler filed her petition for review, alleging *inter alia*, that she was a half-sister of the decedent and entitled to participate in the fund. After more than five years after the confirmation of the administrator's account, the reasons should be weighty to induce a court to grant a review and open the account to further litigation, especially should the delay be clearly and satisfactorily accounted for. In such case there should be no laches: *Scott's Appeal*, 112 Pa. 427. The question of the petitioner's right to participate in the fund was adjudicated by this Court, the adjudication being founded upon the ruling of the Superior Court in *McCully's Estate*, 12 Pa. Sup. Ct., 78.

There are but two cases in which a review of an account settled and confirmed in the Orphans' Court can be claimed as a matter of right:

1. For error of law, apparent upon the face of the record; -2. For new matter which has arisen since the decree. As a matter of grace, a review may be granted for new proof which has come to light since the decree was passed, and which could not have been used at the original hearing of the cause: Hartman's Appeal, 36 Pa. 70.

The petition avers no error in law apparent upon the face of the record, nor does it allege any new matter which has arisen or been discovered, or after discovered evidence, such as might under the rulings of the Supreme Court entitle the petitioner to the review *ex gratia*. Yet these are the sole grounds for a bill of review. The petitioner was not entitled to participate in the distribution of the fund in the hands of the administrator.

The estate having been settled according to law and the fixed rule of procedure, and the petitioner being a stranger to the estate for the reason that the decedent was an illegitimate son of Martha Creveling, and died without making testamentary disposition of his property, the same escheated, and the petitioner being a legitimate daughter of Martha Creveling, was and is without legal status as a claimant upon the fund.

The Act of 1840 requires that the errors be specifically pointed out before rehearing be granted. Here there is little more than a general allegation that the account contains securities which the petitioner believes are collectable, and the further general allegation that the petitioner believes the attorney fees, administrator's commissions and escheator's fees are without warrant, extortionate and illegal.

In Riddle's Estate, 19 Pa. 443, Justice Lewis, in delivering the the opinion of the Court, says:

"A bill of review, according to the first ordinances of Lord Chancellor Bacon respecting bills of that kind, can be brought only in two cases: the first is for error in law, appearing in the body of the decree, without further examination of matters of fact; and the second for new matter, which has arisen after the decree. A bill of review may also, by special leave, be allowed for new proof that has come to light after the decree, which could not possibly have been used at the time when it passed. It is said that this rule has never been departed from." And "that the Act of 1840, which directed the court to give such relief as equity and justice may require may be understood as adopting the prin-

ciples of equity, which had heretofore governed Courts of Chancery in applications of this kind." And "to allow this to a party who cannot allege any error in law appearing on the face of the decree: or that he has discovered any new evidence, or that any new matter has arisen, would not be administering justice or equity."

The construction given by the Supreme Court to the Act of October 13, 1840, is now firmly settled. A petition for review, therefore, must aver error of law appearing in the record without further examination of matters of fact, or new matter which has arisen since the decree, or that new proof has been discovered, which could not possibly have been used at the time when the decree was made. Tried by this standard the petition of Martha J. Kressler presents no sufficient reasons for a review. The petition exhibits no error of law appearing in the record without further examination of matters of fact, no allegation of new matter which has since arisen, no averment of new proof since discovered. A bill of review must be founded upon some error apparent upon the record, and the evidence cannot be looked into to support an objection upon the supposed error of the court in deductions therefrom. And where the petition for a review of an account confirmed, alleges no error of law apparent upon the face of the record, but error merely, determinable on the facts, and there is no allegation of after discovered testimony, the petition should be refused.

Unfortunately for the petitioner, no error of law is set forth in her petition, or appears anywhere in the record. It is a question of fact pure and simple. The Act of 1840 was never intended to open accounts for the re-trial of questions of fact, years after they have been passed upon by a competent tribunal. As there was no error of law upon the face of the record, the petitioner is not entitled to a review as a matter of right; as there was no allegation of after discovered testimony, she is not entitled to it as a matter of grace.

Moreover, the petition is definite in this, that it does not allege that the balance found to be due was not paid over by the accountant. The petition is in the nature of a bill in equity, and must set forth all things necessary to give the court jurisdiction; here, however, the one thing of all others, necessary to give the court jurisdiction, the proviso in the Act of 1840, viz.: "That this Act shall not extend to any cause

where the balance found due shall have been actually paid and discharged by any executor, administrator, or guardian," is omitted. This allegation not being made is fatal. It is necessary to allege that the balance found due by the decree sought to be reviewed has not been paid over by the accountant: *Russell's Appeal*, 34 Pa. 258. As will appear by the record in this case, the balance found to be due has actually been paid and discharged by the accountant, as already noted.

This case seems to be directly within the letter and spirit of the proviso of the Act of 1840. It was to prevent any injustice that a bill of review is denied after a "balance found due shall have been paid over." The proviso protects the accountant. The decree confirming the auditor's report is presumptively right, and it would be neither equity or justice to punish the accountant for yielding obedience to it.

The Orphans' Courts of this Commonwealth have no power under the Act of October 13, 1840, to open decrees confirming the accounts of executors, administrators and guardians, and re-examine said accounts, where the balance thereby found to be due has in the meantime been actually paid and discharged: *Lehr's Appeal*, 98 Pa. 25.

In a petition for review in the Orphan's Court, it is indispensably necessary that it be alleged in the petition that the balance found due by the decree sought to be reviewed has not been paid over by the accountant: *Cramp's Appeal*, 81 Pa. 90.

The Act of 1840 was meant as a shield to the honest accountant.

Its evident purpose was that the decree should never be disturbed so as to do injustice to the accountant. If under it he had paid over money, he ought to be protected in that payment, even though it should subsequently appear to have been wrongful. The Act was never intended to disturb an appropriation already decreed and consummated by payment, but rather where the object of the review is to surcharge an accountant with money received by him, not accounted for, and therefore not at all included in the decree, then to be operative.

In no single particular has the petitioner brought herself within the lines laid down for those who seek to obtain a bill of review of an account that has been confirmed, and after the balance found due has been paid and discharged. What are the requirements? First, the petition must allege some error of law apparent upon the face of the record; second, it must allege some new matter which has arisen since the de-

cree; and third, it must allege that the balance found to be due has not been paid and discharged by the accountant.

The petition of Martha J. Kressler lacks every essential to bring it within the jurisdiction of the Court and nothing remains but to dismiss it.

Now, September 25th, 1906, the petition of Martha J. Kressler, for a review is dismissed, at the costs of the petitioner.

Forbidding the erection of billobards upon private property located on a boulevard or pleasure drive, or in any street where three-fourths of the buildings are devoted to residential purposes, without the consent in writing of at least three-fourths of the resident property owners on both sides of the street, is held, in *Chicago vs. The Gunning System* (Ill.) 70 L. R. A. 230, to be unreasonable.

From the time a passenger places himself under the charge of the carrier as he begins his journey until he is afforded the opportunity to leave the premises of the carrier at its termination, he is held, in *Fremont, E. & M. V. R. Co. vs. Hagblad* (Neb.), 4 L. R. A. (N. S.), 254, to be a "passenger being transported," within the meaning of a statute relating to injuries to persons while being transported on railroads, unless by some act not attributable to the carrier the relation ceases

The right of a sleeping car company to refuse to admit to its car a person having a contagious disease, although he has purchased a ticket for passage thereon, is sustained in *Pullman Co. vs. Krauss* (Ala.), 4 L. R. A. (N. S.), 103.

Starting a street car before an incoming passenger has reached his seat is held, in *Bennett vs. Louisville R. Co.* (Ky.), 4 L. R. A. (N. S.), 558, not to be negligence, where there is nothing in his appearance to indicate that he needs unusual care and precaution for his protection.

In the Court of Common Pleas of Lackawanna County, No. 888, March Term, 1906.

QUO WARRANTO.

Commonwealth ex. rel. W. R. Lewis, District Attorney vs. John Carden, et al.

The term of a councilman's office in boroughs divided into wards is three years.

Messrs. A. A. Vosburg, John H. Bonner and P. L. Walsh, for petitioners.

Mr. R. J. Bourke, for respondent.

Opinion by Edwards, P. J., September, 1906.

By agreement of the parties this case was tried before a judge without a jury. The question of law involved having been settled by the Supreme Court in a recent case it is necessary to make only a few formal findings of fact.

1. The controversy in this case relates to the organization of the council of Archbald borough. There are two rival councils in the borough, the legality of either council depending upon the question of the length of the term of office to which certain councilmen were elected—whether one or three years. The suggestion in this case being at the relation of the District Attorney, we can inquire only as to the three councilmen named among the respondents.

2. Archbald Borough is divided into three wards and the borough council consists of nine members.

3. The respondents are six in number. Three of them are councilmen and the other three hold offices to which they were elected by the council of which the three councilmen are members. The title of the three councilmen to their offices is attacked on the ground that they were elected for a term of three years, the lawful term being one year, as claimed by the relator. The names of the said councilmen are John Carden, Abraham Howell and John McHale. The names of those elected by the council are Thomas Price, Justus Bishop and R. J. Bourke.

the last February election for the term of three years; John McHale was elected councilman from the Second ward at the same election for the same term; Abraham Howell was elected councilman from the

First ward in February, 1905, for the term of three years.

5. On the first Monday of March last the three members named in paragraph four met with at least three, if not four, other councilmen and organized the borough council. These other councilmen were John Maren, Edward Munley and M. J. McHale, who were three-year men and whose terms had not yet expired. There is some question as to the presence of Martin Cawley; but he may be left out of the controversy, because without him there was a clear majority of the council. The council, organized as stated, elected Price, Bishop and Bourke to various offices. Their title to their respective offices is attacked on the ground that the council which elected them was not a legal organization.

CONCLUSIONS OF LAW.

1. The lawful regular term of councilman of the Borough of Archbald is three years.
2. John Carden, Abraham Howell and John McHale, three of the respondents, were in March last lawful councilmen of said borough.
3. The council which organized on the first Monday of March last and in which Carden, Howell and McHale (John) participated is the legal council of the borough.
4. John Carden was elected councilman from the First ward at
4. Price, Bishop and Bourke, who were elected to certain offices, are legally entitled to said offices.
5. Judgment in this case should be entered for the defendants.

DISCUSSION.

As already stated, the determination of one question of law ends the controversy in this case. If the lawful term of a councilman in the Borough of Archbald is three years the defendants are entitled to judgment in their favor. The present action is founded on the proposition that the term of a councilman's office in the boroughs divided into wards is one year. The proposition is not without some merit; and the relator was justified in bringing the action, because our court has decided the question in favor of the relator's contention. However, the Supreme Court in the case of Hayes vs. the Borough of Old Forge,

recently handed down, has decided the question definitely and finally. Hence, we must enter judgment for the defendants.

We, therefore, find in favor of the defendants and against the Commonwealth. The Prothonotary is directed to give notice of our decision forthwith to the parties or their attorneys; if no exceptions are filed within thirty days after the service of said notice the Prothonotary is directed to enter judgment for the defendants. In accordance with the provisions of the act of 1836 we direct the County of Lackawanna to pay the costs.

A carrier who fails to perform promptly his contract to transport the scenery and properties of a traveling show, knowing that their absence will prevent a performance, is held in *Weston vs. Boston & M. R. Co. Mass.*, 4 L. R. A., (N. S.), 569, to be liable for the value of the ordinary earnings of the properties during the time the owner is deprived of their use, less the expense which he is saved by inability to exhibit; and the fact that such damages are not provided for in the shipping articles is held to be immaterial.

A street railway company is held in *Omaha Street R. Co. vs. Boesen (Neb.)*, 4 L. R. A. (N. S.), 122, not to be an insurer of its passengers, nor to be bound to do everything that can be done to insure their safety, but to fulfill its obligations in that regard when it exercises the utmost skill, diligence, and foresight consistent with the practical conduct of the business in which it is engaged.

Where a passenger was injured by the starting of a train while he was alighting therefrom, the fact that the train stopped the usual ordinary time at the station is held in *Chicago, R. I. & P. Co. vs. Wimmer (Kan.)*, 4 L. A. A. (N. S.), 140, not to be conclusive that a sufficient length of time was given the passengers to alight; and whether the stop was reasonably sufficient under the circumstances is held to be a question for the jury

In the Court of Common Pleas of Lackawanna County, No. 1022, September Term, 1906.

MANDAMUS.

Commonwealth ex. Rel. Joseph P. Jennings vs. Michael J. Garvey.

A borough treasurer, elected with the assistance of persons acting as councilmen but whose title as councilmen was in dispute and against whom a judgment of ouster was subsequently entered, has not a good title to office.

Query: Is such a person a de facto officer?

Even though the council was a de facto body it would not make the treasurer a de jure officer.

While his acts might be legal so far as third parties are concerned, when he undertakes to establish his right to the office for his own benefit he must show himself legally entitled to it. It is true that where strangers are concerned it is sufficient, for rights depending upon official acts, to show that the acts were performed by the officer de facto. But where the officer himself is claiming rights by virtue of his office, he must show that he was legally qualified to act—that he was the officer de jure as well as de facto.

The act of an officer de facto where it is for his own benefit is void; because, he shall not take advantage of his own want of title which he must be conscious of; but where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good.

Messrs. M. J. Martin, T. P. Donahoe, W. P. Jennings and R. J. Manning, for relator.

Mr. John H. Bonner, for respondent.

Mr. A. A. Vosburg, for I. F. Price.

Opinion by Kelly, A. L. J., December, 1906.

On the 15th day of August, 1906, the relator presented his petition to the Court setting forth that he was the regularly elected and qualified Treasurer of the Borough of Moosic; that he had been elected to succeed Michael J. Garvey, the defendant, who had been elected Treasurer for the year beginning the first Monday of March, 1905; that the defendant had refused to deliver over to him the books, papers, moneys, etc., which belonged to the borough; and praying that an alternative writ of mandamus should be allowed commanding the defendant to turn over to the relator such books, papers and moneys. On the 10th day of September, 1906, one I. F. Price presented a petition in this proceeding setting forth that he was the duly elected and qualified Treasurer of the borough; that he had previously instituted proceedings by a writ of quo warranto against Michael J. Garvey, the defendant, in order to establish his title to the office, and that Garvey filed an answer to the writ in which he admitted that he had no title to the

office; that thereupon he had procured an alternative writ of mandamus against Garvey commanding him to turn over to him the funds and other property of the borough; that Jennings the relator in this case had no title to the office; and praying that he might be allowed to intervene and make defense in this case and that his petition might be allowed to be filed as an answer. An order was made as prayed for and an issue was made by the filing of a replication by the relator.

As set forth in the petition I. F. Price as relator did institute mandamus proceedings against Garvey to No. 1036 September Term, 1906, and Garvey made return to the writ in which he denied Price's title to the office; a replication was filed, and the case is now before us for disposition. Both cases were heard together by agreement before the Court without a jury, under the provisions of the Act of 22d April, 1874, P. L. 109.

In accordance with the requirements of the Act we find the facts and state our conclusions of law.

FINDINGS OF FACT.

1. The Borough of Moosic was duly incorporated under the provisions of the Act of 3d April, 1851, P. L. 320, on the 9th day of December, 1898, and on the 19th day of November, 1900, by decree of the Court of Quarter Sessions of Lackawanna County it was divided into four wards. In the decree it was directed that thereafter the borough council should consist of eight members, two to be elected by the electors of each ward.

2. During the fiscal year beginning on the first Monday of March, 1905, and ending on the first Monday of March, 1906, the borough council was composed of the following members: From the First ward, Joseph Woodbine and Christopher Connors; from the Second ward, Michael Moran and Thomas Lynett; from the Third ward, Charles Broadhead and William Sanderson; and from the Fourth ward, Daniel James and James Cotter.

The terms of Christopher Connors from the First ward, Thomas Lynett from the Second ward, Charles Broadhead and William Sanderson from the Third ward, and Daniel James from the Fourth ward, expired on the first Monday of March, 1906. Joseph Woodbine, Michael Moran and James Cotter held over. Andrew Decker was elected

at the February, 1906, election to succeed Christopher Connors; John Sheehan was elected to succeed Thomas Lynett; and Michael Scznyter was elected to succeed Daniel James. So that Woodbine, Moran, Cotter, Decker, Sheehan and Scznyter were all legal members for the year beginning March, 5, 1906. William Sanderson and W. N. Ellis claimed to be the duly elected councilmen from the Third ward for a term beginning March 5, 1906, and Charles Broadhead and W. L. Anthony also claimed to be the duly elected councilmen from the same ward for a term beginning at the same time. The facts thus far stated are not in dispute.

3. A meeting of the old council was held on the evening of March 5, 1906, but at its adjournment no organization was effected for the new year. At the adjournment all left the council chamber except Anthony, Woodbine, Broadhead and Scznyter, who remained for about a half hour, but who also left at about 9:30 o'clock. They came back at about 11:30, with the burgess, one C. S. Snyder. They then, with the burgess, went through the form of an organization and elected officers, among others, I. F. Price, as Treasurer. These five, which included the burgess and Broadhead, whose title was in dispute at that time, afterwards met from time to time. They had a meeting on July 2, 1906, which we will refer to later. This body may be called the Price council.

4. On March 16, 1906, a meeting was held at which were present Sheehan, Moran, Cotter, Decker and Sanderson, who also went through the form of an organization and elected officers, among them Joseph P. Jennings as Treasurer, whose bond was accepted at a later meeting. At this meeting Sanderson, whose title was in dispute at that time, presented a certificate of election and oath of office, and was recognized by the other four as entitled to a seat. He acted with Cotter, Decker, Moran and Sheehan, and later on with Ellis, as a member of council, at meetings held from time to time twice a month until July 2, 1906. At a meeting on April 2, 1906, of this body Ellis was sworn as a member of it. This body may be called the Jennings council.

5. On February 5, 1906, at a regular meeting of the council a resolution was adopted providing that if any member should be absent from three meetings in succession his seat would be declared va-

cant, and council would elect to fill the vacancy. At a meeting of the Jennings council held on May 7, 1906, the seats of Woodbine and Scznyter were declared vacant because of their failure to attend for three successive meetings after notice, and William Martin, Jr., and Charles Webb were elected to fill the vacancies. Martin met with the body afterwards. There is no evidence to show whether Webb did or not.

6. In the meanwhile, on the 24th of March, 1906, in a suit by the Commonwealth, at the relation of the District Attorney, a writ of quo warranto was issued against William Sanderson to test his right to the office of councilman, which resulted in a judgment of ouster being entered against him on June 25th, 1906, and on the 4th day of April following a similar writ issued against W. N. Ellis, which also resulted in a judgment of ouster being entered against him on June 25, 1906. In the quo warranto cases the Court held as a matter of law that William L. Anthony and Charles Broadhead were the legally elected councilmen of the Third ward of Moosic Borough and were entitled to the offices.

7. On the evening of July 2, 1906, in the council chamber a meeting of the so-called Jennings council was held. There were present Sheehan, Cotter, Decker, Moran, Sanderson and Martin. While the body was in session transacting routine business the members of the so-called Price council, Anthony, Woodbine, Broadhead and Scznyter, with the Burgess Snyder, came into the room, and demanded that Sheehan, who was in the chair, should vacate. The burgess served a writ of ouster upon Sanderson, who thereupon immediately ceased to take any further part in the proceedings. The members of the Price council attempted to effect an organization amidst great confusion, while at the time a motion to adjourn was carried by the Jennings council, the members of which then immediately left the chamber, leaving the members of the Price council in possession of it. The latter went through the form of an organization by having their secretary call the roll on each motion and noting the votes of Anthony, Woodbine, Broadhead and Scznyter in the affirmative, with Sheehan, Moran, Cotter and Decker present but not voting, and the burgess casting the decisive vote in the affirmative. Sheehan, Moran, Cotter and Decker did not participate in the so-called organization at all. At its beginning

they were physically present, but were conducting business in their own body, while later they had left the room. The proceedings of the so-called organization were carried on amidst great noise, tumult and confusion, and was a mere scramble on the part of both parties to do business at the same time.

The only members who actually participated in it were Anthony. Broadhead. Woodbine and Scznyter. At the so-called organization meeting Price was again declared elected Borough Treasurer.

CONCLUSIONS OF LAW.

1. The relator has no title to the office of Borough Treasurer of the Borough of Moosic.

2. E. F. Price has no title to the office of Borough Treasurer of the Borough of Moosic.

3. The so-called Price council was not a council of the borough either de jure or de facto.

4. The so-called Jennings council was never a council of the borough de jure. It was at most a council de facto. (We do not decide whether it was a de facto council or not in this proceeding as we do not deem it necessary for a decision of the question here presented).

5. Judgment should be entered in favor of the defendant.

The requests of the parties and our answers follow:

On the part of the relator we are requested to find facts as follows:

1. That Moosic Borough is a municipality of the County of Lackawanna and State of Pennsylvania, organized under the general borough law and divided into four wards.

Answer. Granted.

2. That since the organization and division of the said borough into wards each ward elects two councilmen to serve in the borough council, the whole council consisting of eight members.

Answer. Granted.

3. That at the organization of the borough council for the year beginning March, 1906, the following were councilmen whose seats were not contested: John Sheehan, Andrew Decker, Michael Moran, James Cotter, Joseph Woodbine and Michael Scznyter.

Answer. Granted.

4. That on the 16th of March, 1906, at eight p. m. in the borough

building, the following met for organization: John Sheehan, Andrew Decker, Michael Moran, James Cotter and William C. Sanderson, who presented his certificate of election, took his oath of office, and was seated by the four first named.

Answer. Granted.

5. That at the time the right of William G. Sanderson to the office of councilman was not disputed by any one.

Answer. Refused.

6. That these five councilmen effected an organization by electing a President, Secretary, and Joseph P. Jennings as Treasurer, who filed his bond and accepted the duties of the office.

Answer. Granted.

7. That at the organization meeting of the borough council in March, 1905, Michael J. Garvey was elected Treasurer for the ensuing year or until his successor was elected and qualified.

Answer. Granted.

8. That Michael J. Garvey does not claim to be, and has not exercised any of the duties of the office of Borough Treasurer since the 16th of March, 1906.

Answer. Granted.

9. That in the quo warranto proceedings instituted by Broadhead and Anthony against Sanderson and Ellis the Court of Lackawanna County decided, on the 30th day of June, 1906, that Sanderson and Ellis were not entitled to their seats as councilmen.

Answer. Granted.

10. That William G. Sanderson and W. N. Ellis both produced certificates of election and qualified and served as councilmen with Sheehan, Decker, Moran and Cotter, up to July 2, 1906, when the writ of ouster was served upon Sanderson and Ellis.

Answer. Granted.

11. The council as organized on the 16th of March, 1906, above stated, retained possession of all the borough books, papers and seal, and kept a record of their transactions and minutes of their proceedings in the minute book of the borough.

Answer. Granted.

As conclusions of law we are requested by the relator to find:

That William G. Sanderson and W. N. Ellis were de facto if

not de jure councilmen from the date they took their seats until the writ of ouster was served upon them on the 2d of July, 1906.

Answer. This request is refused for the reason stated in our discussion.

2. That Joseph P. Jennings, the Treasurer elected with the assistance of William G. Sanderson and W. N. Ellis has good title to his office even after such de facto officers have been ousted.

Answer. Refused.

3. That W. N. Ellis and William G. Sanderson, who were declared elected councilmen and qualified and performed the duties of the office, were officers de facto, even though their title to the office of councilman was contested on the ground that they were not legally elected and proceedings to oust them were pending.

Answer. Refused for reasons stated in our discussion.

4. That the meeting on the 2d of July, 1906, in the borough building, was not such a meeting of councilmen as is recognized or contemplated by the law.

Answer. Affirmed.

On the part of I. F. Price we are requested to find facts as follows:

1. That the legally elected councilmen for the Borough of Moosic for the year beginning the first Monday of March, 1906, were the following: From the First ward, Joseph Woodbine and Andrew Decker; Second ward, Michael Moran and John Sheehan; Third ward, Charles Broadhead, W. L. Anthony, and from the Fourth ward, Michael Scznyter and James Cotter.

Answer. Granted.

2. That on the first Monday of March, 1906, Joseph Woodbine, Charles Broadhead, W. L. Anthony, and Michael Scznyter, together with the burgess of said borough, Charles S. Snyder, met in the borough building in the Borough of Moosic, and organized as a council of said borough, and elected officers for the ensuing year; and one of the officers so elected was I. F. Price, who was elected to the office of Treasurer on March 16, 1906. Andrew Decker, Michael Moran, James Lynott, William Sanderson and James Cotter met at the borough building and attempted to organize, electing officers including one Jennings as Treasurer of the Borough of Moosic.

Answer. Refused.

3. That quo warranto proceedings were instituted at the relation of the District Attorney of Lackawanna County against William Sanderson, one of those who was present at the meeting on March 16, 1906, and in June of 1906, judgment of ouster against him was duly filed by the Court of Common Pleas of Lackawanna County, which

judgment was duly served upon Sanderson on July 2, 1906, and from that time on he has not attempted to act as a councilman of said borough, that at a meeting held on July 2, 1906, at a time when the following councilmen were present, to wit: Joseph Woodbine, Andrew Decker, Michael Moran, John Sheehan, Charles Broadhead, W. L. Anthony, Michael Scznyter and James Cotter, a motion was passed by which Charles Broadhead was elected chairman, and while the said eight persons were still present a motion was made duly seconded and put, the vote being by roll call, for I. F. Price for Treasurer for the Borough of Moosic, which vote resulted as follows: Woodbine, Broadhead, Anthony, Scznyter, and the burgess, Charles S. Snyder, voted in favor of said I. F. Price, and no one voted upon said roll call against said I. F. Price, who was thereupon duly declared Treasurer of the Borough of Moosic, and filed his bond which was accepted by the council.

Answer. Refused.

4. That on July 2, 1906, at a regular meeting of the council of Moosic Borough, at which eight councilmen were present, I. F. Price was elected Treasurer by a vote of four councilmen, and the burgess in his favor, and no votes against him.

Answer. Refused.

5. That at a meeting of the council on July 2, 1906, Andrew Decker, John Sheehan, Michael Moran and James Cotter did not leave the meeting until I. F. Price had been voted for, and elected Treasurer of the Borough of Moosic.

Answer. Refused.

As conclusions of law we are requested by I. F. Price to find:

1. That Jennings was not elected Treasurer of the Borough of Moosic at a meeting of council at which there were a quorum of legally elected and duly qualified councilmen.

Answer. Affirmed.

2. That Jennings was not legally elected Treasurer of the Borough of Moosic.

Answer. Affirmed.

3. That where there is a quorum of councilmen present at a regular council meeting, and action is taken at that meeting, it is not material

whether all the councilmen present voted or took any part in the proceedings or not. All the councilmen present in the council room at the time when the councilmanic action is taken must be counted under the law in order to make up a quorum of the council; so as there were more than one-half of the duly elected and legally qualified councilmen of the borough of Moosic present at the meeting of July 2, 1906, when I. F. Price was elected Treasurer of the Borough of Moosic, there was a quorum present, and even though less than a quorum voted upon the election of said I. F. Price as Treasurer, this election was legal.

Answer. Refused.

3½. That after the selection of a secretary, the minutes of the meeting of July 2, as kept by this secretary, are not subject to attack or contradiction by parol evidence, in the absence of fraud or corruption in his record; and that there is no evidence to show fraud or corruption upon the part of the secretary in keeping such minutes.

Answer. Refused.

4. That where there is a tie vote of council, four voting one way, and the others in opposition thereto, the burgess in a borough like the Borough of Moosic, has a right to cast the deciding vote.

Answer. Affirmed.

5. As there were four votes for I. F. Price for the office of Borough Treasurer cast at the meeting of July 2, 1906, he was duly elected Treasurer of said borough.

Answer. Refused.

5½. That no matter how much noise and disturbance there may be in a councilmanic meeting, if there is a quorum of duly elected and qualified councilmen present when the councilmanic action is taken, and a majority of the votes cast is in favor of the election of the candidate for a borough officer, that officer is duly elected. So a majority of the votes cast at the council meeting on July 2, 1906, were in favor of I. F. Price, as Treasurer of said borough, he was duly elected, there being a quorum of councilmen present at the time when the vote was taken.

Answer. Refused.

6. That I. F. Price was duly elected Treasurer of the Borough of Moosic.

Answer. Refused.

7. That a peremptory writ of mandamus should issue against Michael J. Garvey commanding him to turn over the books and papers, and the money of said borough in his hands to I. F. Price as Treasurer of said borough.

Answer. Refused.

DISCUSSION.

The controversy in this case is between Joseph P. Jennings, the relator, and I. F. Price, who has been allowed to intervene as defendant, both claiming the office of Treasurer of the Borough of Moosic. We are satisfied that neither of them is entitled to the office and we so hold under the evidence in the case and the facts as found.

As far as Mr. Price's claim is concerned it is sufficient to say that he was never elected by either a *de jure* or a *de facto* borough council. He does not claim by virtue of his election at the meeting of the so-called Price council held on March 5, 1906, but claims under an election held on July 2, 1906. As we have stated in our seventh finding of fact there was no valid meeting held on that date at which he was elected. Only four members of the council participated in any degree in any proceedings of the meeting in which he was chosen, viz.: Anthony, Woodbine, Broadhead and Scznyter. Sheehan, Moran, Cotter and Decker, the other four legal members of council, took no part in it whatsoever. They were not even present at the meeting, legally speaking, but were merely physically present in the same room while part of it was being held. They were, under the uncontradicted evidence, engaged in holding a council meeting with Sanderson and one Martin present and participating when the other four councilmen came into the hall and attempted to take charge and effect an organization by counting them as present and thus getting a quorum. They immediately adjourned and left the hall when the members of the Price council began to hold a meeting. The situation of affairs during the first few moments was that both parties were trying to do business at the same time. Under such circumstances there was no warrant or authority of law to note the presence of Sheehan and his associates at the alleged meeting of council which elected Mr. Price as Treasurer. It was an undignified scramble to effect an organization, but was not successful.

The claim in behalf of Mr. Jennings is that the body which elected him was a *de facto* council of the borough. We do not deem it wise at this time to decide whether it was a *de facto* body or not, for the reason that there may be many interests involved in the decision of that

question which are not represented here. But conceding for the argument's sake only that it was a *de facto* body it could not make Mr. Jennings a *de jure* officer. It might make him a *de facto* officer, but that would not be sufficient to make out his case. While his acts might be legal so far as third parties are concerned, when he undertakes to establish his right to the office for his own benefit he must show himself legally entitled to it. "It is true that where strangers are concerned, it is sufficient, for rights depending upon official acts, to show that the acts were performed by the officer *de facto*. But where the officer himself is claiming rights by virtue of his office, he must show that he was legally qualified to act—that he was the officer *de jure* as well as *de facto*." Lewis, J., in *Dillon vs. Myers*, Brighty's Rep., 430. It has been repeatedly held that a *de facto* officer cannot maintain an action to recover the fees or salary attached to the office: *Biddle vs. Bedford Co.*, 7 S. & R., 386; *Com'th vs. Shifer*, 25 Pa., 23; *County of Luzerne vs. Pimmer*, 95 Pa., 97. "The act of an officer *de facto*, where it is for his own benefit is void; because, he shall not take advantage of his own want of title, which he must be conscious of; but where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good." Rogers, J., in *Keyser, et al., vs. M'Kissan*, 2 R., 140.

That the council which elected Mr. Jennings was not a *de jure* body is clear, in view of the decisions of this court in the quo warranto proceedings brought against two of the members of it. It was decided that these two had no legal right to the office of councilman. The body was therefore without a legal quorum. Such a body could not elect a *de jure* Treasurer: *Com'th vs. Howorth*, 7 Phila., 339; *Com'th vs. Steele*, 2 North. Co. R., 1. In the former case the question was whether the receiver of taxes of the Twenty-third ward, who had been appointed by the receiver of taxes of the City of Philadelphia, could hold his office after the title of the latter to the office had been decided to be invalid. It was held by Paxson, J., that the title of the ward receiver fell with that of the city receiver who had appointed him. "With the official death of the creator, the creature dies also," said Judge Paxson. In *Com'th vs. Steele* it was held that a city solicitor elected by a *de facto* common council of the City of Easton in conjunction with the select council was but a *de facto* officer. The opinion was by Schuyler, P. J., whose discussion leaves little to be said upon the subject.

We therefore hold that neither of the claimants have any valid title to the office of Treasurer of the Borough of Moosic.



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